80-210

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NELLIE ATKINS ARMSTRONG,
Petitioner,

v.

MAPLE LEAF APARTMENTS, LTD., a limited partnership;
BROKEN ARROW MALL, INC., a corporation;
OWEN D. YOUNG and ROBERT L. LATCH, d/b/a
YOUNG AND LATCH INVESTMENTS, a general partnership;
FIRSTUL MORTGAGE COMPANY, a corporation;
SACKMAN-GILLILAND CORPORATION, a corporation;
FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA,
a national bank association;
HAMILTON INVESTMENT TRUST, A Massachusetts
business trust;
ABERCROMBIE, PEDIGO AND SMITH, INC.,
and H. HAROLD BECKO,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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5-17-79 77-1680

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1680

NELLIE ATKINS ARMSTRONG, Plaintiff-Appellant, v. MAPLE LEAF APARTMENTS, LTD., a limited partnership; BROKEN ARROW MALL, INC., a corporation; OWEN D. YOUNG and ROBERT L. LATCH, d/b/a YOUNG & LATCH INVESTMENTS, a general partnership; FIRSTTUL MORTGAGE COMPANY, a corporation; SACKMAN-GILLILAND CORPORATION, a corporation; FIRST NATIONAL BANK & TRUST COMPANY OF TULSA, OKLAHOMA, a national banking association; HAMILTON INVESTMENT TRUST, a Massachusetts business trust: ABERCROMBIE, PEDIGO & SMITH, INC., and H. HAROLD BECKO, Defendants-Appellees, RUSKIN F. ARMSTRONG, husband of Nellie Atkins Armstrong; MANUEL BROWN, and C.A. WHITEBOOK, Third Party Defendants-Appellees, CREEK NATION OF OKLAHOMA, UNITED STATES OF AMERICA, Amici Curiae.	)	Appeal From the United States District For The Northern District of Oklahoma (D.C. No. 74-C-119)

Jay C. Baker, of Baker, Baker & Martin, Tulsa Oklahoma (C. Rabon Martin, Tulsa, Oklahoma, with him on the Brief), for Appellant.

William B. Jones, of Jones, Givens, Brett, Gotcher, Doyle & Bogan, Tulsa, Oklahoma (Philip J. Eller, Tulsa, Oklahoma with him on the Frief), for Appellees, Maple Leaf Apartments, Ltd., Broken Arrow Mall, Inc., Owen D. Young and Robert L. Latch, d/b/a Young & Latch Investments, Hamilton Investment Trust, and H. Harold Becko.

Douglas L. Inhofe, of Conner, Winters, Ballaine, Barry & McGowen, Tulsa, Oklahoma (Royce H. Savage, Tulsa, Oklahoma, with him on the Brief), for Appellees, Firsttul Mortgage Company, Sackman-Gilliland Corporation, and The First National Bank & Trust Company of Tulsa, Oklahoma.

Robert H. Tips and Theodore P. Gibson, of Farmer, Woolsey, Tips & Gibson Incorporated, Tulsa, Oklahoma, on the Brief for Appellee, Abercrombie, Pedigo & Smith, Inc.

Philip W. Perryman, Tulsa, Oklahoma (John H. Charloe, Tulsa, Oklahoma, on the Brief), for Amicus Curiae, Creek Nation of Oklahoma.

James W. Moorman, Assistant Attorney General, Jacques B. Gelin, and Robert L. Klarquist, Attorneys, Department of Justice, on the Brief for Amicus Curiae, United States of America.

Before SETH, Chief Judge, HOLLOWAY and McKAY, Circuit Judges.

SETH, Chief Judge.

(Filed May 17, 1979)

This is an action to quiet title and to cancel deed brought by the plaintiff who alleges that she is a Creek Indian of the half blood; that she conveyed the tract of land in question by warranty deed to H. Harold Becko in December 1965; and that this deed was not approved by a County Court of Oklahoma as required by the Act of Congress of August 4, 1947 (61 Stat. 732).

The trial court found for the defendants who were the subsequent grantors and those holding under them.

The plaintiff has taken this appeal. A preliminary aspect of this case was before this court and the opinion rendered thereon appears at 508 f.2d 518 (10th Cir.). The case was there remanded to the trial court.

The action so filed by plaintiff sought to cancel the original deed from her and subsequent deeds; to quiet title, and to eject those holding under the original grantor. Under the Oklahoma decisions this is an action in equity and equitable relief is sought. *See* Clovis v. Clovis, 460 P.2d 878 (Okl.); King v. Oakley, 434 P.2d 868 (Okl.). The plaintiff's principal cause appears to be the cancellation of the series of deeds from her to the original grantor, and those deeds to subsequent grantees. The basic attack is on the deed she originally delivered to Mr. Becko.

Some extended review of the facts, the sequence of events, and statutory changes is necessary. The larger tract, of which the land in question is a part, was a surplus allotment in 1903 to Billy Atkins, and he had received a deed from the Muskogee Creek Nation. In 1908, Congress by the Act of May 27, 1908, restricted the alienation of this land.

Billy Atkins died in 1929 possessed of the tract. He was an enrolled, full-blood Creek Indian, and left surviving three children born to himself and his non-Indian wife who had predeceased him.

Each of the three children, Creeks of the half-blood, thus inherited an undivided one-third interest in the 120-acre tract. Their inheritance was confirmed by court proceedings after extended litigation in the state courts.

Upon the death of Billy Atkins, the restrictions on the land terminated automatically by operation of law, and the children took free of any restrictions on the land whatever, and, of course, they were free of any restrictions on themselves as individuals.

In 1944, the plaintiff and her two brothers exchanged deeds with the intention that the undivided interest would be eliminated and each would have the entire interest in a forty-acre tract. The land in issue is part of the forty-acre tract in which the plaintiff had an interest and to which she was deeded the undivided thirds of her two brothers.

Thus after the exchange of deeds, the plaintiff held the land in fee simple absolute. She was not under the General Allotment Act (22 U.S.C. §331), she was as an individual under no restrictions whatever nor did she suffer any legal disability, and obviously was not a ward of the Government. The land itself was under no restrictions whatever by the Government, nor would the proceeds of sale be restricted or limited in any way. The *land* was in this status until the effective date of the Act of August 4, 1947, and, of course, the above described status of the plaintiff continues until the present time.

The Act of August 4, 1947, related to the land only, and did place restrictions on it in the hands of the plaintiff. This Act was 621 Stat. 731 and entitled "An Act Relative to Restrictions Applicable to Indians of the Five Civilized Tribes of Oklahoma." The restrictions imposed by the Act of 1947 applied only to lands received by inheritance. Thus the restriction was on:

> ". . .[A]ny interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same. . . ."

This is the Act relied on by the plaintiff as no effort was made to secure the approval of the county court of the deed from plaintiff to Becko.

The restriction imposed by this Act of August 4, 1947, pertains only to the particular type of land above described and was:

> "[N]o conveyance [of such lands] shall be valid unless approved. . . by the county court of the county in Oklahoma in which the land is situated. . . ."

Thus the interest of plaintiff in the lands in question was at least in part of the category described in the 1947 Act to require the conveyance thereof to be approved by the county court to be "valid." This Act of August 4, 1947, was not included in the United States Code. It was not generally known among attorneys in Oklahoma, according to the finding by the trial court.

The record also shows that the plaintiff was educated in the public schools and that she and her husband at one time had a small business. They planned to use part of the purchase price of the tract in question to acquire or build a new house in the same community, and this they did.

The plaintiff was represented by an attorney, Mr. F.A. Petrik, practicing in Broken Arrow at the time she and her brothers exchanged deeds and before. Apparently, he prepared the deeds for the exchange and testified he had represented the plaintiff since about 1938. He continued to represent her in the protracted dealing with prospective purchasers of the land and with the ultimate purchaser.

As mentioned, the plaintiff and her husband were planning to use a portion of the purchase price from the sale of the property in question to buy a place also in Broken Arrow for a new home. They contracted to buy this property for about $29,000.00 from Mr. Amos Beaver, a full-blood Creek, who had inherited it. They entered into this contract two days before they delivered the deed here concerned to Mr. Becko. In this contract with Mr. Amos Beaver was a requirement by the buyer that his conveyance to plaintiff be approved by the county court, and it was subsequently so approved. The petition for approval and the notices were drafted and signed by Mr. F.A. Petrik as attorney. This was, of course, in 1965, long after the repeal by the 1947 Act of sections 1 and 8 of the 1933 Act. The county court acted under the Act of August 4, 1947, with which we are here concerned. Mr. F.A. Petrik testified that he had handled a number of petitions for county court approval between 1947 and 1965. He testified further that, as to the Beaver purchase, he discussed with the plaintiff and her husband the fact that the deed would have to be approved and there would have to be these court proceedings.

The record also shows that on July 28, 1944, Mr. Petrik wrote to the attorney for the Indian agency at Muskogee about the estate of Billy Atkins. He recited in this letter that he had prepared deeds for the three heirs to exchange to accomplish a partition, and the deeds had been executed. Mr. Petrik received in July a reply to his inquiry from Mr. Robertson, the Probate Attorney at the agency. In this reply the attorney told him that the three heirs were half-bloods, that there was an heirship decree finding that they were the heirs. He also expressed the opinion that there were no restrictions. It is thus clear that Mr. Petrik was advised that the heirs were Creeks of the half blood. This was, of course, before the 1947 Act. The record also shows that the abstract prepared by the plaintiff for the sale in question showed that plaintiff was a half-blood Creek. The determination of heirship in 1934 and the related litigation also showed this.

Attorney Petrik represented the plaintiff and her husband during the extended negotiations on the series of options for the sale of the property in question. A brief description of these events would seem to be necessary.

In 1964, the plaintiff and her husband, after negotiations, gave an option to buy the property to Liles and Barry for a purchase price of $100,000.00 $2,000.00 was paid for the option which was for a period of six months with the right to renew for a like period for $2,000.00 additional. The option was so renewed, but expired in November of 1965. During this option, the optionees sought, with plaintiff's cooperation, annexation of the land to the City of Broken Arrow, sought, again with plaintiff's participation and signature on the two petitions, to have the property rezoned by the city and brought suit to have it accomplished. The optionees kept plaintiff advised of progress of these efforts, and were at no time advised by plaintiff or Mr. Petrik that this would should not continue or that they were in any way dissatisfied. Liles and Barry sold their interest in the option on October 5, 1965, to defendant Becko and so advised plaintiff and her husband.

Mr. Becko did not exercise the option, as above mentioned. and instead started negotiations with plaintiff for a new option. His first proposal was rejected because plaintiff wanted a higher price. A second proposal was made by Becko, and it resulted in the execution of a new option agreement. The price was to be $107,500.00, the option term was for thirty days, the payments of the purchase price were to be over a period of fourteen months. Before the plaintiff and her husband executed this option, they sought and received tax advice from a CPA and from the Field Solicitor of the Bureau of Indian Affairs. They also, of course, received legal advice from Mr. Petrik.

The option was exercised by defendant Becko, the parties met in Mr. Petrik's office and closed the sale. The general warranty deed was delivered to Mr. Becko and he made the payment then due, and gave two notes for the balance secured by a mortgage. Mr. Becko in December of 1966 did not pay a

note then due which represented part of the purchase price and so defaulted. He defaulted also as to the next payment, but no action was taken by plaintiff. Plaintiff was aware of her right to foreclose, as the trial court found. In January 1967, Mr. Becko tendered the total amount due and asked for a release of mortgage. The plaintiff demanded an additional $4,500.00 for such a release, and this was paid.

In 1968, plaintiff and her husband turned over possession of the land to defendant Becko. This was about a year and one-half after they had delivered the deed to Mr. Becko. They had by then bought land from Mr. Beaver in Broken Arrow, as above described, and built a house on it.

The defendant, Broken Arrow Mall, Inc., bought the land from Mr. Becko in December 1971, and later planned construction of apartments. The corporation received a loan of something over a million dollars on the property for this construction. A portion of the tract was also sold to Young & Latch. The buyers and the lenders had the abstracts examined, and none of the title opinions questioned the December 1965 deed to Becko.

In 1973 Maple Leaf Apartments commenced construction of some 116 units. These for the most part were leased and occupied at trial. The other purchasers, Young & Latch, began building the Maple Leaf Shopping Center in 1973, with a construction loan later converted to permanent financing. This construction was almost completed and leased by October 1973. Also Young & Latch had hired a contractor and had begun excavation for an eighty-five apartment development at the time of suit.

The plaintiff and her husband lived in Broken Arrow and saw the construction in progress on the tract they had sold to Becko and were fully aware of the work being done and the expenditures being made thereon. There is no issue as to this knowledge of the extensive development on this land costing something over a million dollars. Also the trial court found as a

fact that plaintiff never changed her mind about the sale to Becko until suit was filed.

The plaintiff thus testified that she had seen on many occasions the shopping center being constructed and leased, the apartments being built and also leased, and the start of construction on the new eighty-five unit apartment group. Neither the plaintiff nor her attorney at any time before filing this suit made known that they were dissatisfied nor that they asserted any claim. Plaintiff thus remained silent while the development was constructed and completed. The shopping center was formally opened about four months before the suit, and the apartments were completed and leased two or three months before this suit.

The trial court found as a fact that the purchase price paid to the plaintiff by Becko was more than the then reasonable value of the land. This finding is amply supported by the testimony of the appraisers.

The plaintiff asserts that the 1947 Act applies to this transaction, and obviously it does. In the option agreement between plaintiff and the buyer Becko, she was to convey merchantable title. To do this she had to comply with the 1947 Act as she had required of the seller in the Amos Beaver purchase. It was her obligation to meet the contract requirements, and thereby, among the many other things, to comply with the 1947 Act with which she and her attorney were apparently familiar.

Thus, if plaintiff knew she was to deliver or was delivering an "invalid" deed, she had a duty, if the transaction was in good faith, to advise the buyer of her inability to perform the contract. It was the seller's duty to reveal that she could not perform under the contract, that she was unable to deliver a valid deed, as she now asserts. It is not a title defect or a cloud on the title, which frequently occurrs, which can be accepted or waived by acceptance of the title as shown by an abstract. It is instead a fundamental matter relating to seller's ability

to perform, to deliver title at all, or title to a substantial undivided interest. It is obvious that the buyer, after the abstract had been examined, knew that the plaintiff was a Creek Indian and that the property had been inherited; nevertheless he was not aware of seller's inability, as she now contends, to deliver a valid deed. It makes no difference for these purposes whether this was a fact or legal matter.

The parties have presented the issue as to the nature of plaintiff's title under th 1947 Act, after the exchange of deeds with her brothers. As mentioned above, there were no restrictions on the interests in the hands of plaintiff or her brothers as these had expired on their father's death. The two-thirds interest she acquired from her brothers was not restricted "in the hands of the person from whom [plaintiff] acquired same." See Act of August 4, 1947, § 1(a). There is no issue present as to a change in restrictions by a partition as there were then no restrictions. After the title was acquired by plaintiff, the 1947 Act sought to *impose* restrictions not theretofore present on certain kinds of estates, basically estates of inheritance, not of purchase. The inquiry then is whether the title in plaintiff comes within the description of interest sought to be covered by the Act.

In Boyd v. Weer, 253 Pac. 988 (Okl.), the State Supreme Court considered a situation where two Creek Indian brothers who had inherited undivided interest exchanged quit-claim deeds. The court held that each of the heirs after the exchange of deeds held their interest acquired by the exchange as an estate acquired by purchase. We hold that these cases are determinative of the issue and thus the plaintiff took one-third of the land by inheritance of the type covered by the Act of 1947 and two-thirds by purchase and thus not covered by the Act. We must again emphasize that exchange of deeds, the "partition" in no way affected a then present restriction, but the consequence was that her original interest was acquired by inheritance and the two-thirds was by purchase from her brothers. Congress in 1947 only intended to reach interests acquired by inheritance; the wording is clear.

In our prior opinion we considered a preliminary injunction against proceedings in the Oklahoma County Court. The question was whether the county court could, at this late date grant approval to the deed in question under the 1947 Act over the objection of the plaintiff. The trial court denied the preliminary injunction and we reversed, holding that the county court proceeding could not continue over plaintiff's objections.

We agree with the application of the doctrine of laches to the claim of the plaintiff as made by the trial court, and agree with the analysis of the law as made by that court as to laches.

As the authorities clearly demonstrate, the Indians of the Five Civilized Tribes have been dealt with by Congress separately and differently from other Indians. Thus the decisions which concern Indians who are under the General Allotment Act (25 U.S.C.A. §331) are not helpful nor are they applicable. The Field Solicitor so testified in this action. *See* Semple, Oklahoma Indian Land Titles, Annot., §730.

Mr. W.F. Semple made a statement and answered questions on May 2, 1947, during the House hearings on H.R. 3173 which became the Act of August 4, 1947. He had then been practicing law in the Choctaw area of Oklahoma for some forty years. He there stated that the Act under consideration was to stabilize titles of the Five Civilized Tribes. He referred to the 1933 Act and the confusion arising there from restrictions on half blood and the full blood, and the distinctions between tax exempt and other lands. Mr. Semple was a Choctaw Indian, he was attorney for the Tribe, was also or had been Chief of the Tribe, as were his grandfather and great-grandfather. Congressman Stigler also made a statement at the same hearing. He said in part, after referring to the confused state of Indian titles: "The whole purpose of this bill is to stabilize and settle once and for all, all those questions of doubt which now exist. . . ." Congressman Stigler was an enrolled Choctaw and had practiced law, specializing in Indian land titles since 1920.

Thus we must apply the 1947 Act so as to attain its purpose, and also apply the act of 1926, hereinafter further considered, to accomplish the same end insofar as it is possible.

It would not seem necessary to describe at length the elements of laches as we described the doctrine in Socony Mobile Oil Co. v. Continental Oil Co., 335 F.2d 438 (10th Cir.), and in Alexander v. Phillips Petroleum Co., 130 F.2d 593 (10th Cir.). The text books further describe the elements. As to the time period used in the application of the doctrine of laches, it is, of course, of secondary importance. The court in the proper case applies laches although the period of time may be much shorter than provided in a statute. *See* Pomeroy, Equity Jurisprudence §419b. It is sufficient to say that all the elements for the application of the doctrine of laches are present. We thus agree with the trial court that the delay of over eight years with knowledge of the facts and law and with reliance by defendants on the deed, the creation of substantial improvements, and the detriment by reason of the delay are more than sufficient to require the application of the doctrine.

By the Act of April 12, 1926, §2, 44 Stat. §240, Congress made the Oklahoma state statutes of limitation applicable to Indians of the Five Civilized Tribes. It expressly so placed them in the same position as ". . . any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her heirs or grantees, either in his own behalf or by the Government of the United States, or by any other party. . . ." The Act was so applied by this court in Wolfe v. Phillips, 172 F.2d 481 (10th Cir.), and there the holding is that the law of the state is applicable. The law of the state is applied whatever it may be from time to time. Congress left the period of time under the statute entirely up to the state and set none itself nor did it adopt any time period. *See also* Seitz v. Jones, 370 P.2d 300 (Okl.). It is obvious that Congress considered it necessary to place these persons on the same footing as non-Indians in Oklahoma to require the prompt assertion of claims and filing of causes of action. Periods of limitation

are of long standing as a practical and necessary device to require, regardless of what may be the equities of the situation, that persons make known, and take formal action to assert claims or rights they may have. It is also apparent that the doctrine of laches follows a parallel course, but with greater emphasis on the defendant's position, and without the requirement of the passage of a specified time. Thus we hold that the Act of 1947 in its application of Oklahoma law of limitations also included the Oklahoma doctrine of laches as it applied to all citizens. The two matters are not separable and for Congress to accomplish its purpose, both limitations and laches must be applied.

We have held on several occasions that the construction of a federal statute is a matter of federal law. Johnson v. United States, 64 F.2d 674 (10th Cir.); Jefferson v. Gypsy Oil Co., 27 F.2d 304 (8th Cir.).

The Oklahoma state statutes of limitation are applicable not as part of the federal law but as state law. The parallel doctrine of laches in Oklahoma is to be derived also from the consequences of the federal act, and should be applied by the federal courts also as part of the state law rather than as federal law. Thus Congress directed the application of Oklahoma statutes of limitation as they may exist from time to time and as applicable to non-Indians. The parallel doctrine of laches also is applicable in the same way, as we have above set forth.

The Act of 1926 is not unique as Congress passed a similar Act in 1902 (Act of May 31, 1902, 32 Stat. 284). This Act was applied in Beaver v. Cowan, 230 Pac. 251 (Okl.), where the court applied the limitations in section 4471 of Mansfield's Digest of the Statutes of Arkansas. This Act of 1902 applied to all Indians.

Also Congress made certain Oklahoma statutes relating to guardianships applicable to members of the Five Civilized Tribes. Of these statutes the Court in Stewart v. Keyes, 295 U.S. 403, said: "These laws remained state laws, as before, and as such

were to be applied to these Indians." The Court held that whether procedures complied with the guardianship laws was a matter of state law, not federal law. The Court there also considered a portion of the Act of 1926.

Thus the application of state laws to Indians of the Five Civilized Tribes is not unusual and state laws have been applied in a number of cases by the federal and state courts, in addition to those herein cited. The purpose of Congress in enacting the Act of 1926 is clear as the necessity to require the prompt litigation of claims relating to real estate had become apparent. The statutes of limitation are for the most part arbitrary in their application. Laches is the comparable device to prevent the assertion of stale claims in equitable proceedings. *See* Alexander v. Phillips Petroleum Co., 130 F.2d 593 (10th Cir.), and Hoehn v. Crews, 144 F.2d 665 (10th Cir.). The consequences of the two are basically the same. Laches is strictly a matter of defense and is not and cannot be used to affirmatively establish a claim. It is strictly a defensive measure to meet a situation where the moving party is advancing an inequitable claim. It cannot really be disassociated from the statutes of limitation in its purposes and consequences. It must be held that Congress also intended this doctrine to be included within the Act relating to limitations.

The equitable modification or variation applied to statutes of limitation is illustrated in Holmberg v. Armbrecht, 327 U.S. 392, where the Court applied equitable principles to the application of state statutes of limitation. This decision obviously relates to federally created rights of action, but the reasoning is persuasive here.

We find nothing in the decisions of the courts of Oklahoma which would prevent or cast doubt on the application of laches to the circumstances before us. The parties have treated at length the several state decisions.

Of the several cases urged by appellant on this point of laches, only Hampton v. Ewert, 22 F.2d 81 (8th Cir.), and Haymond v. Scheer, 543 P.2d 541 (Okl.), treated the issue of laches and neither concerned a member of the Five Civilized Tribes. The plaintiff relies also on Smith v. Williams, 190 Pac. 555 (Okl.), but this decision was handed down in 1920 and hence before the Act of 1926.

As we have indicated above the result or consequences of the application of statutes of limitation on the transactions of the type with which we are here concerned is no different from the application of the doctrine of laches. The arguments of appellant relating to the consequences thus apply equally to the statutes of limitation and have been already answered by Congress.

On the matter of laches, we must again refer to the purchase by plaintiff and her husband of the land from Amos Beaver, a Creek Indian, for a new house. The contract was entered into about two days before the deed was delivered by plaintiff to Becko. There may have been some confusion as to the application of the 1933 Act to half bloods and full bloods, but the contract with Amos Beaver required that the deed from him to the plaintiff be approved by the county court. It was so approved and the petition and proceedings were handled by plaintiff's attorney, Mr. Petrik. These contract requirements were discussed by him with the plaintiff.

The plaintiff also urges that the Supplemental Creek Treaty is involved if laches are applied. However, any restrictions on the application of estoppel have long since expired and we must conclude that the treaty is in no way involved.

The judgment of the trial court is affirmed as to all relief granted defendants insofar as such relief pertains to the two-thirds interest in the subject property which the plaintiff acquired from her brothers, but so affirmed for the reasons

hereinabove set forth. The judgment of the trial court is affirmed, again for the reasons herein set forth, as to the one-third interest plaintiff acquired from her father, but only insofar as it directs the dismissal of plaintiff's complaint, and not as to affirmative relief granted to defendants.

No. 77-1680 - NELLIE ATKINS ARMSTRONG, Plaintiff-Appellant, vs. MAPLE LEAF APARTMENTS, LTD.,et al., Defendants-Appellees.

McKAY, CIRCUIT JUDGE, dissenting:

I question our conclusion that two thirds of the appellant's interest in the land had been acquired by purchase, rather than by inheritance. On this point, Oklahoma law is determinative. While Oklahoma case law is not absolutely free from ambiguity, I believe it takes a view inconsistent with that of today's opinion.

Oklahoma cases have clearly held that a partition among cotenants does not amount to a change in title, but merely adjusts the rights of possession. *In re Estate of Mullendore,* 297 P.2d 1094, 1096 (Okla. 1956) (per curiam). It does not transform an inherited estate into one of purchase. *In re Moran's Estate*, 174 Okla. 507, 51 P.2d 277, 279 (1935) (per curiam). The rule is the same regarding the partition of restricted Indian lands. *In re Pryor's Estate*, 199 Okla. 17, 181 P.2d 979, 984-85, *cert. denied,* 332 U.S. 816 (1947).

Whatever ambiguity may be said to exist in this area stems from two decisions of apparently contrary implication. Our analysis in *United States v. Hale*, 51 F.2d 629 (10th Cir. 1931) is inconsistent with the above stated rule, but that analysis was criticized as contrary to Oklahoma law in *In re Pryor's Estate,* 199 Okla. 17, 181 P. 2d 979, 984, *cert. denied*, 332 U.S. 816 (1947).

The case of *Boyd v. Weer*, 124 Okla. 91, 253 P. 988 (1926) (per curiam) also appears to be in conflict with the inheritance rule. In that case the court regarded an exchange of undivided interests between Indian cotenants as a sale. But the court's analysis was influenced by the fact that the exchange occurred prior to the Act of Congress of June 14, 1918 - - an Act providing for the partition of restricted Indian lands. The court was of the view that such a partition was

unavailable prior to the enactment. 253 P. at 990. *Boyd* is therefore distinguishable from Oklahoma cases following the general rule. More to the point, it is distinguishable from *In re Pryor's Estate*, a case applying the general rule to a post-1918 partition of Indian lands.

In addition to dissenting on the acquisition by purchase issue, I wish to express my concerns about engrafting the doctrine of laches onto the Act of August 4, 1947. While I have no doubt about the correctness of our equitable evaluation, I am not certain the statute we are dealing with leaves room for such equitable considerations.

In the Act of August 4, 1947, Congress provided that

> no conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, *shall be valid unless approved in open court* by the county court of the county in Oklahoma in which the land is situated. . . .

Pub. L. No. 80-336, §1, 61 Stat. 731 (emphasis added). The words seem to be absolute: "no conveyance. . . shall be valid unless approved in open court." The effect of today's decision is to make just such a conveyance valid.

The majority finds support for its invocation of laches in the Act of April 12, 1926, Pub. L. No. 69-98, 44 Stat. 239. It is true that Congress, in Section 2 of that Act, made Oklahoma limitations statutes applicable to the Civilized Tribes. In an appropriate case, such a statute would be assertable to bar an Indian's claim that an unapproved transfer is invalid. But such a result has been legislated by Congress. Today's rule has been promulgated by this court.

The majority suggests that the same Congressional purpose behind applying limitations statutes to the Civilized Tribes supports invocation of the doctrine of laches in this case. It is true, of course, that both laches and limitations statutes seek to bar stale claims. What the majority does not stress is the difference between the two in terms of which stale claims each is designed to bar. Limitations statutes are focused on the mere *passage* of time. By contrast, the doctrine of laches focuses on the *effect* of time's passage. Not much time need pass to justify the doctrine's invocation. What is essential to laches is that the plaintiff's failure to assert his rights has caused prejudice to the defendant and that equity now disfavors the plaintiff. In essence, a balancing of equitites is called for. The doctrine of laches thus has conceptual underpinnings quite different from those of a limitations statute. I therefore do not think it is correct to suggest that by merely authorizing application of limitations statutes, Congress intended that the doctrine of laches would be invoked as well.[1]

Even if laches and limitations statutes could be said to have the same conceptual underpinnings, I would be hesitant to agree that this court should adopt what amounts to an amendment of the 1926 Act. Had Congress desired to permit equitable defenses to be raised against Indian assertions of transfer invalidity it surely could have done so. A Congressional intent to permit such defenses is, at best, rather obliquely suggested in the 1926 Act. Absent such an expression of intent, I do not think we have the authority to fashion today's remedy.

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[1]The majority opinion emphasizes the title stabilizing purpose of the 1947 Act. It seems to me, however, that invocation of the laches doctrine could have a destabilizing effect on title, inviting, as it would, litigation over titles that would be avoided by strict adherence to the requirement that alienation can occur only with court approval. Laches can only be determined in a court battle. Until the battle's outcome is clear, the title will not be.

Aside from these more technical considerations, I am troubled by the implications of our decision. It is beyond question that Congress imposed alienation restrictions on Indian lands to protect those Indians who might otherwise lose their property through disadvantageous real estate transactions. *E.g.*, 1 *Hearings on H.R. 3173 Before the Subcomm. on Indian Affairs of the House Comm. on Public Lands*, 80th Cong., 1st Sess. 43 (May 2, 1947) (statement of Rep. Albert). In the face of considerable contrary authority,[2] we have opened

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[2]The majority refers to no judicial authority supportive of its position. In contrast, several cases have expressed hostility to equitable evasions of alienation restrictions. *E.g.*, Hampton v. Ewert, 22 F.2d 81, 92 (8th Cir. 1927), *cert. denied*, 276 U.S. 623 (1928); Haymond v. Scheer, 542 P.2d 541, 545 (Okla. 1975); Naharkey v. Sand Springs Homes, 177 Okla. 371, 59 P.2d 289, 292-93, *cert. denied*, 299 U.S. 588 (1936); Scott v. Dawson, 175 Okla. 550, 53 P.2d 538 (1936); Smith v. Williams, 78 Okla. 297, 190 P. 555 (1920).

Perhaps the most articulate rejection of such equitable exceptions appeared in Smith v. Williams, 78 Okla. 297, 190 P. 555, 557 (1920):

> The right on the part of an Indian to alienate his land, and the right on the part of any person to purchase such land and to acquire valid title thereto is peculairly and strictly a statutory right created by acts of Congress, and which right is not possibly available except through the means which Congress has prescribed, for Congress has expressly said that any attempt to acquire such rights, except through the means prescribed by Congress, shall be absolutely null and void. Therefore title to restricted Indian land cannot be acquired from the allottee upon equitable grounds.

While *Smith* involved the consideration of an alienation restriction provision antedating that of the 1947 Act, its rationale remains relevant. The right to alienate Indian lands remains one of Congressional origin.

The majority distinguishes *Smith* because it was decided prior to the statute of limitations provision of the 1926 Act, suggesting that Oklahoma courts would no longer take this approach. Because I believe Congress has not provided for assertion of equitable defenses in the 1926

the door to equitable avoidances of these Congressionally imposed protections. In doing so, I fear that we may be frustrating Congressional purposes and endangering Indian lands. While the equities of this particular case are not in favor of the plaintiff,[3] it does not require much creativity to imagine a scenario in which the equities are extremely close but where the trial court has made a judgment against an Indian. We might then be barred by the clearly erroneous test from reaching another result. When this occurs, the damage Congress sought to avoid by imposing alienation restrictions will have been done.

(Footnote 2 continued:)

Act, I do not believe the Oklahoma courts, any more than this court, have authority to so provide on their own contrary to the statute. In any event, I note that principles similar to those of *Smith* have recently been upheld in an Oklahoma decision dealing with non-Civilized Tribes. Haymond v. Scheer, 543 P.2d 541, 545 (Okla. 1975). Furthermore, *Smith* itself has been cited in a post-1926 decision for the proposition that estoppel principles cannot be employed to validate a conveaynce otherwise invalid for violation of alienation restrictions. Scott v. Dawson, 175 Okla. 550, 53 P.2d 538, 541-42 (1936).

[3]It is not disputed that plaintiff received a fair price for the land, that she had legal counsel in connection with the sale, and that she had some awareness at the time of sale that Indian land transactions can require court approval. In addition, the defendants have invested considerable sums of money in the lands obtained from the plaintiff. There is no question that the return of the lands to the plaintiff would result in great economic losses to defendants. Without minimizing the harshness of the result, I wish to point out that the result is not without parallel in the law. Courts countenance similar occurrences by allowing infants to be relieved from contractual obligations. *E.g.*, Burnand v. Irigoyen, 30 Cal. 2d 861, 186 P.2d 417 (1947); Doenges-Long Motors, Inc. v. Gillen, 138 Colo. 31, 328 P.2d 1077 (1958) (en banc).

Today's opinion upholds a transfer to title that is void under the Act of August 4, 1947. The opinion is troublesome because it transforms the near-absolute protection[4] of the Act into a protection dependent on the potential effervescence of equitable balancing. Because I question our authority to make this transformation, and because the transformation seems to be inconsistent with the purpose of the alienation restrictions, I respectfully dissent.

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[4] Application of limitations statutes admittedly makes the protection less than absolute.

ARMSTRONG v. MAPLE LEAF APARTMENTS, LTD.
Cite as 436 F. Supp. 1125 (1977)

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Nellie Atkins ARMSTRONG, Plaintiff,

v.

MAPLE LEAF APARTMENTS, LTD., a limited partnership, Broken Arrow's Mall, Inc., a corporation, Owen D. Young and Robert L. Latch, d/b/a Young & Latch Investments, a general partnership, Firstul Mortgage Company, a corporation, Sackman-Gilliand Corporation, a corporation, First National Bank & Trust Company of Tulsa, Oklahoma, a Banking Association, Hamilton Investment Trust, a Massachusetts Business Trust, and, H. Harold Becko, Defendants.

No. 74-C-119

United States District Court, N.D. Oklahoma.

Aug. 2, 1977.

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[1128] Jay C. Baker, C. Rabon Martin, Baker, Baker & Martin, Tulsa, Okla., for Nellie Atkins Armstrong, plaintiff.

William Jones and Philip J. Eller, Jones, Givens, Brett, Gotcher, Doyle & Bogan, Inc., Tulsa, Okl., William H. Mattoon, Norman, Okl., James D. Groves, James R. Ryan, James L.

Kincaid, Douglas L. Inhofe, Royce H. Savage, Dan A. Rogers and Charles A. Whitebook, Tulsa, Okl., for Maple Leaf Apartments et al., defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BARROW, Chief Judge

On February 22, 1974, the plaintiff instituted the subject action in this Court seeking to quiet title to real property situated in Tulsa County, Oklahoma, to cancel a deed thereto given by her under date of December 3, 1965, to cancel all instruments of conveyance and encumbrance executed and recorded since her deed of December 3, 1965, and for ejectment of the defendants in possession of the subject real property. The plaintiff predicated her right to the relief sought upon the Act of Congress of August 4, 1947, 61 Stat. 731, wherein a conveyance by a member of the Five Civilized Tribes of one-half (½) blood or more covering real property inherited or devised to such member by one in whose hands such real property was restricted against alienation is required to be approved by the County Court of the County in which the real property is situated as a condition precedent to the validity of such conveyance. Subsequent to the filing of this action and prior to the joinder of issues on the merits between the parties herein, the defendant Becko instituted proceedings in the Probate Division of the District Court of Tulsa County, Oklahoma (formerly the County Court of Tulsa County, Oklahoma) in which he sought to have the plaintiff's deed of December 3, 1965 approved. Following institution of such approval proceedings, the plaintiff filed in this cause her motion for a preliminary injunction seeking to enjoin the defendants from continuation of the approval proceedings in State Court. Thereafter and before the issues were joined by the parties on the merits of this cause, hearings were held on plaintiff's Motion for Preliminary Injunction and evidence introduced by plaintiff in support thereof. The defendants introduced no evidence at such hearings. Thereafter, on April 19, 1974, this Court entered

its Order herein denying plaintiff's Motion for Preliminary Injunction. The plaintiff thereupon appealed the Order denying preliminary injunction to the United States Court of Appeals, Tenth Circuit (Case No. 74-1286). On December 12, 1974, the Court of Appeals, in a divided opinion, found that the evidence introduced by the plaintiff at the preliminary injunction hearing was sufficient to show a probable right in the plaintiff to the relief sought in this cause and a probable danger that irreparable injury would result to the plaintiff if the preliminary injunction was not granted. Accordingly, the judgment of this Court on the matter of the preliminary injunction was reversed and the cause remanded. *Armstrong v. Maple Leaf Apartments, Ltd., et al.*, 508 F.2d 518 (10th Cir. 1974). This Court thereupon issued its Preliminary Injunction in accordance with such Circuit Court opinion. Thereafter, the defendants filed their respective answers and counterclaims seeking to quiet their respective titles in and to the subject real property as against the plaintiff and her husband and the issues were joined upon the merits of this cause.

[1129] On the 1st day of June, 1977, the above styled and numbered cause came on for trial before the undersigned Chief United States District Judge for the Northern District of Oklahoma. The plaintiff introduced her evidence and rested. The defendants introduced their evidence and, at the conclusion thereof, moved this Court to amend their pleadings to conform to the evidence, which motion was granted. The defendants thereupon rested. At the conclusion of the trial, on June 6, 1977, and following arguments of counsel for the parties, the Court took this case under advisement. The Court, having examined all pleadings on file herein, having given due consideration to the testimony of witnesses and litigants sworn and examined in open court, their demeanor, intelligence, knowledge and credibility, and due consideration to all other evidence introduced in this cause by the parties hereto, having given due consideration to the arguments of counsel and the authorities submitted by the parties herein, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. It is significant to note that the evidence presented and the issues raised in the trial on the merits of this cause materially and substantially differ from the evidence and issues that were before this Court and the Circuit Court of Appeals in connection with the preliminary injunction proceedings heretofore conducted in this cause.

2. This is an action in which the plaintiff seeks to quiet title against the defendants to the following described real property situated in Tulsa County, State of Oklahoma, to-wit:

> Lots One (1), Two (2) and Three (3), Block One (1), and Lots One (1) and Two (2), Block Two (2), Maple Leaf Addition, an Addition to the City of Broken Arrow, Tulsa County, State of Oklahoma, according to the recorded plat thereof,

together with all improvements thereon and rights and appurtenances thereunto belonging. In this action, the plaintiff seeks further to void and cancel that certain General Warranty Deed dated December 3, 1965, made, executed and delivered by the plaintiff and her husband, Ruskin Armstrong, to the defendant H. Harold Becko covering the above described real property and premises. The plaintiff likewise seeks in this action to recover possession of the above described real property together with all improvements thereon. The defendant Maple Leaf Apartments, Ltd., by Counterclaim, seeks to quiet its title in and to Lot One (1), Block Two (2) of said Maple Leaf Addition as against the plaintiff and her said husband, said defendant having acquired its title thereto by mesne conveyances from the defendant H. Harold Becko. The defendants Owen D. Young and Robert L. Latch, d/b/a Young & Latch Investments, a general partnership, by Counterclaim seek to quiet their title to the remainder of the said Maple Leaf Addition against the plaintiff and her husband, the latter defendants having likewise acquired their title by mesne conveyances from

the defendant H. Harold Becko. At the time of the conveyance of December 3, 1965 by plaintiff and her husband to the defendant H. Harold Becko, the above described real property was not platted and was, in fact, conveyed by metes and bounds. (Defendants' Exhibit No. 6).

3. The plaintiff predicates her right to quiet title to the subject real property and to possession thereof and to cancellation of the deed of December 3, 1965 upon the Act of Congress of August 4, 1947. It is the contention of the plaintiff that under the terms of the Act of August 4, 1947, the subject real property became restricted against alienation by the plaintiff; that any deed of conveyance thereto by her must be approved by the County Court of Tulsa County, Oklahoma, which approval has not been obtained; that accordingly, the deed of conveyance of December 3, 1965 to the defendant H. Harold Becko is invalid and vested no title in him in and to the subject real property. It is the contention of the defendants that the Act of August 4, 1947 as applied to the facts and circumstances of this case is unconstitutional and that, in any [1130] event, such Act creates no more than a rebuttable presumption of incompetency and overreaching, which presumption defendants contend has been clearly rebutted by the evidence introduced in this cause. The defendants further contend that the plaintiff is guilty of laches in asserting her claim to title and possession of the subject property and that the plaintiff comes into equity seeking quiet title and cancellation of deed with unclean hands and is therefore not entitled to such equitable relief.

4. The subject real property is a part of the surplus allotment of one Billy Atkins who was duly enrolled March 13, 1902 on the rolls of the Creek Nation, Five Civilized Tribes, opposite Roll No. 826, as a full-blood Creek Indian (Plaintiff's Exhibit No. 2). On May 6, 1903, the said Billy Atkins was allotted as his surplus allotment, by deed issued by the Muskogee Creek Nation, the following described real property, to-wit:

> The East Half of the Northwest Quarter (E/2 NW/4) and the Southwest Quarter of the Northwest Quarter (SW/4 NW/4) of Section 14, Township 18 North, Range 14 East of the Indian Base & Meridian, in Indian Territory, containing one hundred twenty (120) acres, more or less, according to the United States survey thereof. (Plaintiff's Exhibit No. 1)

That upon admission of Oklahoma to statehood, such real property became a part of Tulsa County, State of Oklahoma.

5. On April 24, 1929, the said Billy Atkins died intestate in Wagoner County, Oklahoma, seized and possessed of his above described surplus allotment. (TR. 112 and Plaintiff's Exhibit No. 6). The Estate of Billy Atkins was probated in Wagoner County, Oklahoma. (TR. 25 and Plaintiff's Exhibit No. 6) At the time of his death, Billy Atkins was a resident of Wagoner County, Oklahoma, which county had been his principal residency during his lifetime. (TR. 24) At no time during the lifetime of the plaintiff did Billy Atkins reside on any part of his above described surplus allotment. (TR. 24 & 37)

6. At the time of Billy Atkins' death, April 24, 1929, he left surviving as his sole and only heirs-at-law three (3) children, namely, the plaintiff herein, Nellie Atkins Armstrong, her brother Legus Atkins, and her brother Eddie Atkins. (TR. 12-13 and Plaintiff's Exhibit No. 6) Said heirs were half-blood Creek Indians and inherited an undivided one-third (1/3) interest each in and to the above-described surplus allotment of Billy Atkins. (TR. 86 & 13 and Plaintiff's Exhibit No. 6)

7. On June 27, 1944, the plaintiff and her brother, Eddie Atkins, joined by their respective spouses, conveyed by Quit-Claim Deed to Legus Atkins the following described portion of the foregoing surplus allotment of Billy Atkins:

> The East Half of the West Half of the Northwest Quarter (E/2 W/2 NW/4) of Section 14, Township 18 North, Range 14 East, Tulsa County, Oklahoma. (Plaintiff's Exhibit No. 3)

On the same date, June 27, 1944, the plaintiff and her brother, Legus Atkins, joined by their respective spouses, conveyed by Quit-Claim Deed to Eddie Atkins the following described portion of the foregoing surplus allotment of Billy Atkins:

> The West Half of the West Half of the Northwest Quarter (W/2 W/2 NW/4) of Section 14, Township 18 North, Range 14 East, Tulsa County, Oklahoma. (Plaintiff's Exhibit No. 5)

On the same date, June 27, 1944, Legus Atkins and Eddie Atkins, joined by their respective spouses, conveyed by Quit-Claim, Deed to the plaintiff herein the following described portion of the foregoing surplus allotment of Billy Atkins:

> The Southeast Quarter of the Northwest Quarter (SE/4 NW/4) of Section 14, Township 18 North, Range 14 East, Tulsa County, Oklahoma. (Plaintiff's Exhibit No. 4)

The real property which is the subject of this action is a part of the latter described real property acquired by the plaintiff, one-third (1/3) by inheritance from her father, Billy Atkins, and the remaining two-thirds (2/3) by virtue of the latter described Quit-Claim Deed (Plaintiff's Exhibit No. 4) from Legus Atkins and Eddie Atkins and their respective spouses.

[1131] 8. On November 18, 1964, the plaintiff, Nellie Armstrong, and her husband, Ruskin Armstrong, as "Optionor", made, executed and delievered to one Dale A. Liles and one James W. Barry, as "Optionees", an exclusive option and privilege to purchase for a total purchase price of One Hundred

Thousand and No/100 Dollars ($100,000.00), the subject real property, together with all improvements thereon and appurtenances thereto belonging. (Defendants' Exhibit No. 3) The plaintiff was paid the sum of Two Thousand and No/100 Dollars ($2,000.00) as consideration for the granting of this option. (TR. 46 & 453 and Defendants' Exhibit No. 3) The option consideration was not to be applied against the purchase price in the event of the exercise of the option by the Optionees (TR. 57-58 & 453 & 465 and Defendants' Exhibit No. 3) The Option was for a term of six (6) months, to expire on May 18, 1965, but contained a provision for renewal of the option for an additional term of six (6) months upon the payment by the Optionees to the plaintiff of an additional sum of Two Thousand and No/100 Dollars ($2,000.00). (Defendants' Exhibit No. 3) On May 17, 1965, the Optionees did, in fact, renew the option for an additional term of six (6) months, and did, in fact, pay to the plaintiff and her husband the required sum of Two Thousand and No/100 Dollars ($2,000.00) for such renewal. (Defendants' Exhibit No. 1) The latter sum likewise was not to be credited against the $100,000.00 purchase price in the event of the exercise of the option (TR. 57-58 & 465 and Defendants' Exhibits Nos. 1, 2 and 3) This option, by its own terms, would have expired on November 18, 1965 unless exercised. This option was not exercised and expired on November 18, 1965 and the plaintiff retained the $4,000.00 option consideration paid.

Negotiations resulting in this option agreement of November 18, 1964 were initiated in the fall of 1964 when the plaintiff and her husband advised the Optionee, James W. Barry, that they were interested in selling the real property which is the subject of this lawsuit, in order that they might buy a new home. (TR. 443-445) The original offer by the Optionee, James W. Barry, for the subject real property was the sum of $50,000.00 and negotiations proceeded in increments of $10,000.00 until the final purchase price of $100,000.00 contained in the option agreement was, in fact, agreed to. (TR. 449-451) In the negotiation and execution of the option

agreement of November 18, 1964, the plaintiff was represented by Mr. F.A. Petrik, attorney at law, of Broken Arrow, Oklahoma. (TR. 45-46 & 203-204) Mr. Petrik has been a practicing attorney in Tulsa County, Oklahoma since 1935 and had been the attorney for the plaintiff and her husband since 1938 (TR. 203)

During the term of the option agreement of November 18, 1964, the Optionees spent several thousands of dollars in obtaining annexation of the property to the City of Broken Arrow, Oklahoma, in preparing and processing through four public hearings two (2) rezoning applications with the Planning Commission and City Commission of the City of Broken Arrow, Oklahoma, and in preparing and filing a District Court suit to rezone such property when the zoning was denied by the City, in negotiating for financing of improvements on the subject real property, in obtaining feasibility studies for the subject real property, and in negotiating leases with prospective tenants of improvements to be placed on the subject property. (TR. 468) The annexation petition, the two rezoning applications and the District Court rezoning petition were each signed by the plaintiff and her husband. (TR. 457-461) The plaintiff and her husband were kept advised currently by the Optionees of the progress of the annexation, zoning, financing and leasing of the optioned real property. (TR. 463) At no time did the plaintiff or her husband or their attorney, F.A. Petrik, request or demand termination of the option agreement of November 18, 1964, or express to the Optionees any dissatisfaction therewith. (TR. 468)

On October 5, 1965, the interest of the Optionees in the option agreement of November 18, 1964 was purchased by the de-[1132]fendant H. Harold Becko (TR. 179) Immediately after the purchase of the option by defendant Becko, the plaintiff and her husband were advised thereof (TR. 180-181)

9. The defendant H. Harold Becko did not exercise the option of November 18, 1964 which he had purchased from Liles and Barry because of knowledge that the plaintiff

and her husband were not going to permit the exercise of such option without the payment of additional money or without litigation in the event enforcement of the option agreement was sought. (TR. 185) In lieu thereof, the defendant Becko submitted to the plaintiff and her attorney, F.A. Petrik, a proposed new option agreement calling for the same total purchase price of $100,000.00, but payable in fourteen (14) months in lieu of five (5) years. (Defendants' Exhibit No. 4 and TR. 181-182) The plaintiff refused to accept the proposed new option (Defendants' Exhibit No. 4) because the plaintiff wanted more money for the land. (TR. 182)

Following rejection of the original proposed new option agreement of defendant Becko, a second new option agreement on mutually satisfactory terms was, in fact, negotiated between the plaintiff and her husband, as "Optionors", and the defendant H. Harold Becko, as "Optionee", which final option agreement was duly executed and acknowledged by the parties thereto on November 12, 1965. (TR. 182-184 and Defendants' Exhibit No. 5) The latter option agreement covered the real property which is the subject of this lawssuit (Defendants' Exhibit No. 5) and was for a term of thirty (30) days. (TR. 184 and Defendants' Exhibit No. 5) The executed option agreement of November 12, 1965 materially differed from the former Barry and Liles option of November 18, 1964 in the following respects:

(a) The Becko option agreement increased the total purchase price to be paid the plaintiff from $100,000.00 to $107,500.00; and,

(b) The Becko option was for a term of thirty (30) days with no renewal provisions, while the Barry and Liles option was for a term of six (6) months with a six (6) months' renewal provisions; and,

(c) The Becko option required the payment of the purchase price in two (2) payments over a period of

fourteen (14) months, while the Barry and Liles option provided for five (5) payments over a period of five (5) years; and,

(d) The Becko option agreement permitted the plaintiff to retain possession of the improvements on the optioned property until development, whereas the Barry and Liles option did not.

[TR. 184-185 & 478 & 65-66 and Defendants' Exhibits Nos. 3 and 5]

During the negotiation of the executed option agreement of November 12, 1965 with defendant Becko and prior to its execution, the plaintiff and her husband received tax counsel and advice with regard thereto from a certified public accountant (TR. 86) and from the Field Solicitor of the Bureau of Indian Affairs. (TR. 440-441 and Defendants' Exhibit No. 34) Also, during the negotiation and execution of such option agreement, the plaintiff and her husband received legal counsel and advice from their attorney, F.A. Petrik. (TR. 61 & 474-481)

On December 3, 1965, the defendant H. Harold Becko exercised his aforesaid option of November 12, 1965 and the parties to the latter option agreement met in the office of F.A. Petrik in Broken Arrow, Oklahoma and concluded the Contract of Sale resulting from the exercise of the option. (TR. 481-482 & 186) At the time and place of closing, the plaintiff and her husband duly executed, acknowledged and delivered to the defendant H. Harold Becko, a General Warranty Deed to the real property which is the subject of this lawsuit; said General Warranty Deed being dated December 3, 1965 and duly acknowledged said date before F.A. Petrik. (Defendants' Exhibit No. 6 and TR. 482 &70-71) At the same time and place, the defendant Becko paid to the plaintiff, pursuant to the terms of the option agreement and resulting Contract of Sale the sum of Twenty-nine Thousand and No/100 Dollars ($29,000.00) and duly exe-[1133]cuted and

delivered to the plaintiff two (2) promissory notes of even date, one such note being in the principal sum of Thirty-five Thousand Five Hundred and No/100 Dollars ($35,500.00) having a final maturity date of December 19, 1966 (Defendants' Exhibit No. 29), and one note in the principal sum of Forty-three Thousand and No/100 Dollars ($43,000.00) having a final maturity date of January 19, 1967 (Defendants' Exhibit No. 30). At the same time and place, the defendant Becko made, executed and delivered to the plaintiff a Real Estate Mortgage to secure said promissory notes. (Defendants' Exhibit No. 17 and TR. 71 & 482 & 189) The peaceable and voluntary possession of the subject real property was delivered by the plaintiff and her husband to the defendant Becko approximately one and one-half (1½) years following delivery by plaintiff to defendant Becko of the deed thereto. (TR. 190)

10. The execution and delivery of the option agreement of November 12, 1965 by the plaintiff and her husband to the defendant H. Harold Becko, and the execution, acknowledgement and delivery of the General Warranty Deed of December 3, 1965 by the plaintiff and her husband to the defendant Becko were each the free and voluntary acts of the plaintiff and her husband, Ruskin Armstrong.

11. At the time of the negotiation, execution and delivery to the defendant H. Harold Becko of the option agreement of November 12, 1965, and at the time of the execution and delivery to the defendant Becko of the General Warranty Deed of December 3, 1965, the plaintiff was forty-five (45) years of age (TR. 10), had received a formal education in the Public Schools of the City of Tulsa, Oklahoma, had owned and operated a business with her husband, had negotiated the purchase and sale of several tracts of real property, and had negotiated several loan and other business transactions. (TR. 26 & 50 & 436)

12. The proceeds of the sale of the subject real property by plaintiff to defendant H. Harold Becko were used by the plaintiff to pay debts, to build and furnish a quality residence,

and to purchase a farm in Wagoner County, Oklahoma. (TR. 76-77 & 82 and Defendants' Exhibit No. 26)

13. On December 1, 1965, and two (2) days prior to the closing of the real estate sales transaction with defendant H. Harold Becko and delivery to him of a General Warranty Deed to the real property which is the subject of this action, the plaintiff and her husband contracted to purchase the real property on which the plaintiff's quality home was erected from one Amos Beaver; that Amos Beaver was a Creek Indian, and the contract of purchase specifically provided that the deed to be given by Amos Beaver to the plaintiff and her husband was subject to the approval of the Department of Interior, Office of Indian Affairs, and the County Court of Tulsa County, Oklahoma; that pursuant to said agreement, Amos Beaver and Stella Beaver, his wife, made, executed and delivered to the plaintiff and her husband a General Warranty Deed on said December 1, 1965, two (2) days prior to plaintiff's deed to defendant Becko (Defendants' Exhibit No. 25); that said proceedings for approval of such deed were, in fact, conducted in the County Court of Tulsa County, Oklahoma, and the attorney preparing and processing such approval proceedings was, in fact, the plaintiff's attorney, F.A. Petrik. (Defendants' Exhibit No. 25)

14. Since 1938, Mr. F.A. Petrik of Broken Arrow, Oklahoma served as the attorney for the plaintiff and her husband. (TR. 76 & 203) Mr. Petrik is and was an experienced title and probate attorney. (TR. 223) Mr. Petrik served as the plaintiff's and her husband's counsel in the exchange of Quit-Claim Deeds between the plaintiff and her two brothers, in the negotiation, preparation, approval and execution of the Becko option agreement of November 12, 1965, as well as the former Barry and Liles option agreement of November 18, 1964. Likewise, Mr. Petrik represented the plaintiff at the closing of the real estate sales transaction between the plaintiff and defendant H. Harold Becko culminating in the execution and delivery by the plaintiff and her hus-[1134]band to defendant Becko of the General Warranty Deed of December 3,

1965 covering the subject real property. (TR. 203-204 & 219-220 & 45-46 & 61 & 474-482 & 186) Contrary to the testimony given at the preliminary injunction hearing in this matter in April, 1974 and the implications therefrom, Mr. Petrick did, in fact, know that the plaintiff was a one-half (½) blood Creek Indian who had inherited the subject real property from her full-blood father, Billy Atkins (TR. 220-222 and Defendants' Exhibits Nos. 31 and 32) and Mr. Petrik had, in fact, during the period from August 4, 1947 to and including December 3, 1965, prepared, processed and conducted several approval proceedings in the County Court of Tulsa County, Oklahoma for the approval of deeds of Indian heirs. (TR. 224) One such proceeding was the sales transaction between the plaintiff herself and Amos Beaver referred to in Finding of Fact No. 13 immediately above.

15. The defendant H. Harold Becko did not pay to the plaintiff the $35,000.00 promissory note given to her as a part of the purchase price of the subject real property when the same became due on December 19, 1966, but defaulted therein and in the Purchase Money Real Estate Mortgage given to secure the same. (TR. 229 & 190-191 & 483-484) No suit was instituted by the plaintiff on said note or to foreclose such mortgage by reason of such default. Likewise, the defendant Becko failed to pay the $43,000.00 promissory note given to the plaintiff as part of the purchase price of the subject real property when the same became due on January 19, 1967 and defaulted therein and in the Purchase Money Real Estate Mortgage given to secure the same. (TR. 229 & 191 & 484) Again no suit was instituted by the plaintiff on the latter described promissory note or to foreclose her real estate mortgage securing the same by reason of the latter default. (TR. 191) Thereafter, on the 28th day of January, 1967, the plaintiff and her husband met the defendant Becko at the First National Bank of Broken Arrow, Oklahoma. At the latter time and place, the defendant Becko tendered the amount of the two notes in default and requested a release of the plaintiff's Purchase Money Real Estate Mortgage but the plaintiff refused to execute and deliver a release of such

mortgage unless the defendant Becko paid to the plaintiff approximately $4,500.00 estimated to be the additional income taxes the plaintiff would be required to pay because of receipt of payment of both notes in the same calendar year of 1967. (TR. 74 & 192-193) In order to obtain the release of mortgage, the defendant Becko did, in fact, pay to the plaintiff the additional sum of approximately $4,500.00, as well as the balance of the purchase price of the subject real property evidenced by these two promissory notes and real estate mortgage. (TR. 74 & 192-193) Thereupon, the plaintiff, Nellie Armstrong, joined by her husband, Ruskin Armstrong, duly executed, acknowledged and delivered to the defendant Becko a release of the Purchase Money Mortgage of December 3, 1965 (TR. 74 & 193 and Defendants' Exhibit No. 18)

16. In 1968, plaintiff and her husband delivered peaceable possession of the subject real property to defendant H. Harold Becko and moved into their new home at 91st Street and Lynn Lane in the City of Broken Arrow, Oklahoma (TR. 77 & 189-190 &195)

17. The plaintiff received from the defendant H. Harold Becko as the total purchase price of the subject real property the sum of $107,500.00 (TR. 186 & 191-192 & 75) The fair market value of the subject property at the time of its sale by plaintiff to defendant Becko and delivery of General Warranty Deed thereto on December 3, 1965 was the sum of $91,900.00 (TR. 351 & 360 & 364 and Defendants' Exhibit No. 33) or $15,600.00 less than the amount received for such property by the plaintiff. The Court-appointed appraisers in this cause each testified that they had to strain to get the value of the subject property as of the date of conveyance by plaintiff up to the figure of $91,900.00. (TR. 355 & 360 & 365) The purchase price received by the plaintiff exceeded its fair market value on December 3, 1965 by approximately seventeen percent [1135] (17%). This excess in value of the purchase price paid over the fair market value of the real property at the time of purchase does not include the $4,000.00 option consideration received by the plaintiff from James W. Barry

and Dale A. Liles, nor does the same include the approximate $4,500.00 additional sum paid by the defendant H. Harold Becko to the plaintiff to procure a release of the Purchase Money Mortgage. On the date of conveyance of the subject real property by the plaintitt to the defendant H. Harold Becko, December 3, 1965, the subject property was substantially unimproved, was being devoted to agricultural purposes, was unplatted and unzoned. (TR. 35 & 334 & 447 and Defendants' Exhibit No. 6)

18. On the 18th day of December, 1971, the defendant Broken Arrow's Mall, Inc. acquired title to the subject real property through mesne conveyances from the defendant H. Harold Becko. On February 17, 1971, the defendant Broken Arrow's Mall, Inc. platted the property into Maple Leaf Addition to the City of Broken Arrow, Oklahoma. (Defendants' Exhibit No. 7) Thereafter, such defendant developed the subject real property and on the 25th day of February 1972, said defendant obtained a $1,150,000.00 loan from the defendant Sackman-Gilliand Corporation on Lot One (1), Block Two (2) of Maple Leaf Addition for the construction of the Maple Leaf Apartment project. (TR. 494-496) Prior to commencement of construction of such apartment project, the defendant Broken Arrow's Mall, Inc. conveyed said Lot One (1), Block Two (2) Maple Leaf Addition to the defendant Maple Leaf Apartments, Ltd., who assumed the $1,150,000.00 construction loan. (TR. 494-496) Thereafter, the defendant Broken Arrow's Mall, Inc. conveyed the balance of Maple Leaf Addition, consisting of Lots One (1), Two (2) and Three (3), Block One (1) and Lot Two (2) Block Two (2), to the defendants Owen D. Young and Robert L. Latch, d/b/a Young & Latch Investments, a general partnership for the total purchase price of $280,000.00 (TR. 499 & 514 & 519-520) Neither the defendant Maple Leaf Apartments, Ltd. nor the defendants Owen D. Young and Robert L. Latch d/b/a Youn & Latch Investments, a general partnership, have conveyed any portion of the subject real property so acquired by them.

19. Subsequent to the conveyance of the subject real property by the plaintiff to defendant H. Harold Becko on December 3, 1965 and prior to the institution of this lawsuit by the plaintiff on February 22, 1974, the subject real property was developed by the defendants Maple Leaf Apartments, Ltd. and Owen D. Young and Robert L. Latch d/b/a Young & Latch Investments, a general partnership, and the following improvements constructed thereon:

(a) An apartment project known as Maple Leaf Apartments was constructed on Lot One (1), Block Two (2), of said Maple Leaf Addition by the defendant Maple Leaf Apartments, Ltd.;

(b) A shopping center known as Maple Leaf Shopping Center was constructed on Lot Two (2), Block Two (2) of said Maple Leaf Addition, less and except the North one hundred fifty feet (150') thereof, by the defendants Owen D. Young and Robert L. Latch; and,

(c) Construction of an additional apartment project was commenced on Lot One (1), Block One (1) of Maple Leaf Addition by the defendants Owen D. Young and Robert L. Latch.

Construction of the Maple Leaf Apartments project was commenced by the defendant Maple Leaf Apartments, Ltd. in the year 1973 and completed by it in December, 1973. (TR. 505) This apartment complex contains one hundred sixteen (116) dwelling units, most of which have been leased by defendant Maple Leaf Apartments, Ltd. and are occupied by their tenants. (TR. 499 & 503) The project contains ten (10) major buildings and two (2) auxiliary buildings. (TR. 502) The auxiliary buildings consist of a laundry and clubhouse or cabana building used in conjunction with the project's swimming pool. (TR. 502) The total cost incurred by the defendant Maple Leaf Apartments, Ltd. in the development, construction and furnishing of this [1136] apartment project

was the sum of $1,407,929.25 (TR. 496) The interim or construction loan of defendant Sackman-Gilliand on this apartment project was converted to a permanent loan in the year 1973, the unpaid balance of such loan on the date of trial being the sum of $1,135,610.77. (TR. 496 & 498) A substantial amount of time, effort and money was expended and risk assumed by the defendant Maple Leaf Apartments, Ltd. and its individual partners in the planning, financing, development, construction and leasing of the Maple Leaf Apartments complex.

20. The defendants Owen D. Young and Robert L. Latch, d/b/a Young & Latch Investments, a general partnership, commenced construction of the Maple Leaf Shopping Center in the year 1973 and had substantially completed and leased the Center by October, 1973. (TR. 528 & 539) The shopping center was constructed on Lot Two (2), Block Two (2), Maple Leaf Addition, less and except the North one hundred fifty feet (150') thereof. (TR. 516) The total cost expended by these defendants in the development, leasing and construction of the shopping center was $388,127.31. (TR. 529) The construction loan on the subject shopping center in the principal sum of $320,000.00 was made by the defendant First National Bank & Trust Company of Tulsa, Oklahoma, a national banking association, and remains outstanding. (TR. 525 & 546 & 548) The defendants Owen D. Young and Robert L. Latch have expended considerable time, effort and money and assumed substantial risks in the acquisition, financing, development, construction and leasing of this shopping center. The promissory note evidencing the construction loan of $320,000.00 on this shopping center was personally executed by the defendants Owen D. Young and Robert L. Latch and their respective spouses, and there is no exoneration or exculpatory clause contained in such note or the real estate mortgage securing the same (TR. 526) None of the principal indebtedness of $320,000.00 has been paid and interest has continued to accrue since the filing of this lawsuit on February 22, 1974. (TR. 548-549)

21. The North one hundred fifty feet (150') of Lot Two (2), Block Two (2), and Lots Two (2) and Three (3), Block One (1) of Maple Leaf Addition located immediately adjacent to and north of the Maple Leaf Shopping Center is vacant land. (TR. 516-518) In 1973, the defendants Owen D.Young and Robert L. Latch, joined by their respective spouses, procured a mortgage loan in the principal sum of $150,000.00 covering all of the latter described real property. (TR. 521-522 & 546-548) The promissory note evidencing this loan and the mortgage securing the same do not contain any exoneration or exculpatory provisions. None of the principal of this mortgage indebtedness has been paid and interest has continued to accrue thereon since the filing of the subject lawsuit on February 22, 1974. (TR. 548)

22. In July, 1973, the defendants Owen D. Young and Robert L. Latch procured an interim or construction mortgage loan in the sum of $975,000.00 from the defendant Hamilton Investment Trust for the construction of a ninety-five (95) unit apartment complex on that part of the subject property described as Lot One (1), Block One (1) Maple Leaf Addition. (TR. 545) The promissory note evidencing this interim or construction loan was personally executed by the defendants Owen D. Young and Robert L. Latch and contained a guaranty of performance commitment by such defendants. (TR. 548) At the time this lawsuit was commenced on February 22,1974, the defendants had obtained their building permit for this apartment project, had hired a general contractor therefor, had hired an architect and completed the plans and specifications for the apartments, and had already completed 95% of the excavation work for the 95-unit apartment project. (TR. 541-542) At the time of commencement of this suit approximately $173,000.00 of this interim loan had been drawn down by the defendants. (TR. 547) None of this mortgage indebtedness has been repaid to the defendant Hamilton and interest has continued to accrue thereon since the date of filing of the instant lawsuit. (TR. 548)

[1137] 23. The Court-appointed appraisers in this cause made the following findings of fair market value of the subject real property and improvements as of the dates indicated (Defendants' Exhibit No. 33):

A.	The value of all of the subject land on December 3, 1965 (date of conveyance by plaintiff to defendant Becko		$ 91,900.00
B.	The value of all of the subject land, exclusive of improvements, on February 22, 1974 (date this suit was filed):		
	(i) Lot One (1) Block One (1), Maple Leaf Addition	$ 91,591.00	
	(ii) Lots Two (2) and Three (3), Block One (1) and the North one hundred fifty feet (150') of Lot Two (2), Block Two (2), Maple Leaf Addition	93,591.00	
	(iii) Lot Two (2), Block Two (2), Maple Leaf Addition, less the North one hundred fifty feet (150') thereof	93,557.00	
	(iv) Lot One (1), Block Two (2), Maple Leaf Addition	186,096.00	
	TOTAL VALUE:		$ 464,882.00
C.	The value of all of the subject land, including improvements, on February 22, 1974 (date this suit was filed):		

(i)	Lot One (1) Block One (1), Maple Leaf Addition	$ 91,591.00	
(ii)	Lots Two (2) and Three (3), Block One (1), and the North one hundred fifty feet (150') of Lot Two (2), Block Two (2), Maple Leaf Addition	93,638.00	
(iii)	Lot Two (2), Block Two (2), Maple Leaf Addition, less the North one hundred fifty feet (150') thereof	392,947.00	
(iv)	Lot One (1) Block Two (2), Maple Leaf Addition	1,130,509.00	
	TOTAL VALUE:		$1,708,685.00

24. Prior to their acquisition of Lots One (1), Two (2) and Three (3), Block One (1) and Lot Two (2) Block Two (2) of Maple Leaf Addition, the defendants Owen D. Young and Robert L. Latch employed the services of an attorney to examine the title to all of said real property and did, in fact, obtain a written title opinion as to all of the same prior to the acquisition thereof. (TR. 521 & 523) Likewise, the defendants Broken Arrow's Mall, Inc. and Maple Leaf Apartments, Ltd. employed the services of an attorney and acquired a title opinion to the subject property prior to their acquisition of any interest therein. (TR. 511-512) The defendant H. Harold Becko likewise employed the services of attorney Charles Whitebook for examination of title to the subject real property prior to purchasing the same from the plaintiff and said attorney did render a written title opinion thereon. (TR. 13-14 and Plaintiff's Exhibit No. 5) None of such title opinions procured by any of said defendants questioned the validity of the deed of

December 3, 1965 or referred to any restrictions imposed upon the transfer of the subject property by the Act of August 4, 1947. (TR. 485 & 521) In fact, one abstract company in Tulsa, Oklahoma has in its files alone thirty-five (35) title opinions involving titles deraigned from the 120-acre surplus allotment of Billy Atkins in which no requirement was made with regard to approval of conveyances or relating to the restrictions against alienation imposed by the Act of August 4, 1947. The overwhelming majority of these title opinions were rendered after 1947. (TR. 489)

25. Subsequent to passage of the Act of August 4, 1947, and prior to execution and delivery of the Deed of Conveyance of December 3, 1965 sought to be declared invalid by the plaintiff in this action, the plaintiff conveyed to various third parties substantially all of the land owned by her and comprising a part of the surplus allotment of her father, Billy Atkins, and not included in the subject sale to defendant Becko, and during such period granted easements and other encumbrances to third parties covering lands owned by her and comprising a part of the surplus allotment of Billy Atkins. (TR. 432-435 & 36 & 39-40 & 50) None of said conveyances, easements and encumbrances to third parties (i.e., parties not defendant herein and parties not related to plaintiff) were approved by the County Court of Tulsa County, Oklahoma, or any other court nor was such approval sought to void any conveyance, easement or en-[1138]cumbrance granted by her on any part of the lands owned by her and comprising a part of the surplus allotment of Billy Atkins, save and except the conveyance of the subject property to the defendant H. Harold Becko involved in this case. (TR. 335) Since the filing of the instant lawsuit, the plaintiff has been requested by the grantee in one of such conveyances, the City of Broken Arrow, Oklahoma, to consent to approval of its conveyance from plaintiff, which request of such City was granted by the plaintiff conditioned upon payment to plaintiff by the City of Broken Arrow, Oklahoma of the sum of $2,500.00 for such consent. (TR. 83-86 & 91-92) Such sum was exacted and paid by the City of Broken Arrow, Oklahoma to obtain the plaintiff's

consent. (TR. 92) Since 1947, some sixty (60) further deeds, in addition to mortgages and other encumbrances have been filed of record involving title deraigned from the surplus allotment of Billy Atkins, none of which have been approved by the County Court of Tulsa County, Oklahoma, nor has approval thereof been requested or sought. (TR. 485-489) Many homes have been built on a part of the land acquired by the plaintiff from Billy Atkins and deeded to third parties not involved in this litigation, which accounts for this quantity of unapproved deeds. (TR. 488-489)

26. Although the testimony introduced herein was to the effect that the exchange of Quit-Claim Deeds between the plaintiff and her brothers referred to above in Findings of Fact No. 7 was for the purpose of accomplishing a voluntary partition of the surplus allotment of Billy Atkins, only the Quit-Claim Deed to the plaintiff from her brothers and their spouses appears in the abstracts of title to the subject real property examined by the defendants. (TR. 337-338) The two Quit-Claim Deeds received by the two brothers on the balance of the surplus allotment of Billy Atkins do not appear therein as neither Quit-Claim Deed covers any part of the subject real property. (Defendants' Exhibits Nos. 8 and 9) The Quit-Claim Deeds themselves make no reference to an exchange of deeds or partition but contain recitations of consideration received. (Defendants' Exhibits Nos. 8, 9 and 10) There is no way the defendants could, from abstracts of title or land records of the subject property, have determined that there was an exchange of Quit-Claim Deeds in lieu of an actual purchase by plaintiff of her brothers' interest in the subject real property. No evidence was introduced in this lawsuit that any of the defendants or their predecessors in title to the subject real property had any actual knowledge of the two Quit-Claim Deeds given to the plaintiff's brothers Legus Atkins and Eddie Atkins.

27. The plaintiff, Nellie Armstrong, admittedly observed on numerous occasions the Maple Leaf Apartments being constructed and leased, the Maple Leaf Shopping Center being

constructed and leased, and the excavation being made for the 95-unit apartment complex on Lot One (1), Block One (1), Maple Leaf Addition prior to the filing by her of this lawsuit did the plaintiff demand or request of any defendant in this lawsuit a return of title or possession of any part of the subject real property conveyed by her to Harold Becko on December 3, 1965, or otherwise make known any claim by her thereto. (TR. 81-82) The plaintiff remained silent as to any claim by her to the subject property during the entire period that the defendants Maple Leaf Apartments, Ltd. and Owen D. Young and Robert L. Latch were expending readily observable and substantial amounts of money and time in the improvement of the subject property. (TR. 81 & 195-196 & 551) Less than 120 days expired between the time of formal opening of the shopping center in October, 1973 and completion and leasing of the Maple Leaf Apartment project in December, 1973, and the filing of the instant litigation on February 22, 1974.

28. The Act of August 4, 1947 was never codified. (TR. 400) It does not appear in the United States Code, nor does the text of the Act appear anywhere in the United States Code Annotated. (TR. 400) The only reference to the Act is contained in a footnote in the United States Code. (TR.[1139] 400) The existence of the Act of August 4, 1947 is not generally known among the legal profession in the State of Oklahoma. (TR. 398-400 & 488-490) Such is evidenced by the fact that none of the conveyances from the plaintiff to any part of the surplus allotment of Billy Atkins acquired by her were approved or sought to be approved by the County Court of Tulsa County, Oklahoma prior to the filing of the instant lawsuit and is evidenced by the large number of conveyances of title deraigned from the plaintiff to a part of such surplus allotment that have not been approved or approval thereof requested, and as evidenced by the large number of title opinions since 1947 covering lands comprising a part of the surplus allotment of Billy Atkins in which absolutely no reference to required approval or restrictions is made. Lack of knowledge of this Act and its applicability is further indicated by the testimony of the Field Solicitor of the Bureau of Indian Affairs. (TR. 397-400)

29. Of all the conveyances by the plaintiff of a part of the surplus allotment of Billy Atkins acquired by her, the only conveyance which the plaintiff has sought to set aside is the conveyance of Deccember 3, 1965 to the defendant H. Harold Becko, not platted as Maple Leaf Addition. (TR. 335) It is the only conveyance on which improvements of substantial value and which are readily marketable have been placed.

30. It is the opinion of the United States Probate Attorney for the Bureau of Indian Affairs and the Field Solicitor for the Bureau of Indian Affairs that upon the death of Billy Atkins on April 24, 1929 his 120-acre surplus allotment was inherited by his three half-blood unenrolled heirs, including the plaintiff herein, free and clear of any restrictions against alienation. (Defendants' Exhibit No. 32 and TR. 106 & 119-120) It is the opinion of Mr. Harold Shultz, Field Solicitor for the Department of Interior, Bureau of Indian Affairs, that the land remained unrestricted at least until August 4, 1947 (some 18½ years beyond the death of Billy Atkins) and that during such period the plaintiff could have sold, mortgaged, leased, given away or done anything she wanted to with her interest in this land or the proceeds she received from the land. (TR. 106) It is the further opinion of the Field Solicitor for the Department of Interior, Bureau of Indian Affiars, that there is no such thing as a restricted Indian insofar as the Five Civilized Tribes are concerned (TR. 103-104); that members of the Five Civilized Tribes, such as the plaintiff, are not subject to the General Indian Allotment Act (TR. 116); that members of the Five Civilized Tribes, such as the plaintiff, may and do hold title in their own names in fee simple to real property, whereas Indians subject to the General Indian Allotment Act do not hold title in fee simple to lands but are wards of the United States Government who holds title in trust for their benefit (TR. 116); that cases decided under the General Indian Allotment Act are not construing or involving legislation similar to that regulating the Five Civilized Tribes which are controlled by special legislation perculiar to them. (TR. 116)

31. Neither the United States nor the Department of Interior, Bureau of Indian Affairs, or any other agency of the United States, have sought to intervene in the instant lawsuit because plaintiff has never contacted them or requested their assistance in this matter. The Field Solicitor for the Bureau of Indian Affairs has not formed or expressed an opinion as to the merits of the plaintiff's claim in this lawsuit, nor an opinion as to whether the deed of December 3, 1965 is or is not void. (TR. 160-161)

32. The United States Bureau of Indian Affairs does not have or maintain a file of any nature on the plaintiff Nellie Atkins Armstrong, and has stated through their Field Solicitor that they have no reason to do so. (TR. 107) The plaintiff is not and never has been a ward of the United States of America.

33. The testimony of plaintiff that immediately after execution and delivery of the option agreement of November 18, 1964 to James W. Barry and Dale A. Liles she [1140] wanted out of the transaction and continued thereafter to want out of the transaction, but that she was told by her attorney that she could not legally get out of the transaction, is not credible or believable on the basis of the evidence introduced herein at the trial on the merits of this cause. In the first instance, almost a year after the plaintiff had given the Barry and Liles option of November 18, 1964, the plaintiff, with the assistance of tax counsel and the legal counsel of her attorney, F.A. Petrik, negotiated a new option agreement with the defendant H. Harold Becko for more money than provided in the Barry and Liles option of November 18, 1964 which expired by its own terms on November 18, 1965, (TR.60-63 & 181-185 & 447-480) In addition, the defendant Becko defaulted on the note and purchase money mortgage he gave the plaintiff not once, but twice, and in neither instance did the plaintiff institute or seek to institute foreclosure proceedings. (TR. 190-192 & 483-484) The plaintiff knew of her right of foreclosure (TR. 230) and so did her experienced attorney, Mr. F. A. Petrik, but in lieu of foreclosure, the plaintiff elected

to exact $4,500.00 more money from the defendant Becko. (TR. 75 & 192) Further, the plaintiff already had contracted to spend part of the sale proceeds to be received from defendant H. Harold Becko prior to the closing of the sales transaction with defendant Becko and delivery of deed to defendant Becko and prior to receipt of any part of such sales proceeds. (Defendants' Exhibit No. 25) Further, the purpose of the plaintiff in selling the subject property, as declared to Mr. Barry, was to procure a new home (TR. 444), which the plaintiff, in fact, did. (TR. 76-77 & 82)

34. The testimony of plaintiff that she wanted and still wants to retain the subject land because of objections to sale thereof by her husband and her children and because the land is part of her father's surplus allotment is not credible or believable on the basis of the evidence introduced herein at the trial on the merits of this cause. After giving the Barry and Liles option agreement of November 18, 1964, plaintiff's husband actively participated in negotiations for the Becko option of November 12, 1965, executed the District Court rezoning petition for the subject property, was, in fact, the party who received and receipted for the $2,000.00 consideration for extension of the Barry option, and he did, in fact, participate in the negotiation for the $4,500.00 added consideration extracted from defendant Becko by reason of the latter's default. (TR. 42 & 50 & 460-461 & 455 & 191-192 and Defendants' Exhibit No. 2) It was the husband who, in September, 1965, approximately nine (9) months after the granting of the Barry option, sought the tax counsel of the Bureau of Indian Affairs regarding the sales transaction. (Defendants' Exhibit No. 34) The husband likewise participated in the purchase of the new homesite on which the quality home of plaintiff and her husband was built and, together with plaintiff's children and the plaintiff, received the benefits of the consideration paid to plaintiff by defendant Becko. (TR. 52-55 and Defendants' Exhibit No. 25) Insofar as her desire to retain and reside on her father's allotment is concerned, the plaintiff reserved from the conveyance to defendant Becko a portion of such allotment upon which to build a home but,

in fact, elected to build her new home on a tract completely removed from any part of her father's allotment. (TR. 37 & 76-77) In addition, her father never had his residence on this part of his surplus allotment and during the lifetime of the plaintiff, the family never resided on any part of the father's surplus allotment. (TR. 37-38 & 24) Plaintiff's father principally lived and worked in Wagoner County, Oklahoma and not in Tulsa County, Oklahoma where this land is situated. (TR. 24) The evidence does not support any sentimental attachment by the plaintiff or her family to the subject land predicated on her father's (Billy Atkins') relationship to the land.

35. The plaintiff knew that she was a half-blood Creek Indian, that her father, Billy Atkins, was a full-blood Creek Indian, that the subject real property was restricted in his hands during his lifetime, that she [1141]had inherited an interest in the subject real property from her father, Billy Atkins, that the plaintiff and her attorney, F.A. Petrik, had engaged in proceedings for the approval of deeds under the Act of August 4, 1947 prior to the conveyance to the defendant H. Harold Becko of December 3, 1965 (Defendants' Exhibit No. 25), and knew or should have known that approval proceedings were necessary for the conveyance to defendant Becko of December 3, 1965. Instead, the plaintiff delayed for eight (8) years and approximately three (3) months asserting any claim that the conveyance to defendant Becko was invalid and in the interim the defendants constructed substantial improvements on the subject real property in reliance on the deed of December 3, 1965 and the silence and acquiescence therein of the plaintiff.

36. The plaintiff's right to relief herein is predicated upon the Act of Congress of August 4, 1947 relating to restrictions applicable to Indians of the Five Civilized Tribes of Oklahoma (Plaintiff's Complaint, Pg. 3). The history of this Act is as follows:

In early 1947, H.R. 3173, relating to restrictions applicable to Indians of the Five Civilized Tribes of Oklahoma and for other purposes, was introduced in the United States House of Representatives and referred by it to its Committee on Public Lands. On May 2, 1947, a public hearing was conducted by the House of Representatives Subcommittee on Indian Affairs of the Committee on Public Lands wherein H.R. 3173 (Act of August 4, 1947) was considered and testimony presented. (Defendants' Exhibit No. 23) On June 30, 1947, the Committee on Public Lands of the House submitted House Report No. 740 (Defendants' Exhibit No. 19) to the House of Representatives recommending passage of H.R. 3173 and on July 7, 1947, such bill passed the House. (Defendants' Exhibit No. 22) On July 14, 1947, the Committee on Public Lands of the United States Senate submitted its Report No. 543 (Defendants' Exhibit No. 20) to the Senate recommending passage of such bill and on July 17, 1947, the legislation passed the Senate. (Defendants' Exhibit No. 21) On August 4, 1947, said House Bill No. 3173, with minor amendments, was signed into law.

The announced purpose of H.R. 3173 (Act of August 4, 1947), as stated in House Report No. 740 (Defendants' Exhibit No. 19) and Senate Report No. 543 (Defendants' Exhibit No. 20) and as stated on the floor of the House (Defendants' Exhibit No. 22), was *to clarify, cure and stabilize land titles in Oklahoma.*

There is nothing in the history of the Act of August 4, 1947 to indicate that conditions were such as to warrant the reimposition of restrictions upon Indian lands of the Five Civilized Tribes that had become unrestricted by reason of the death of the allottee. (Defendants' Exhibits Nos. 19-23, inclusive) To the contrary, the testimony of Congressman Albert, Congressman Schwabe, W.E. Semple and others appearing before the Congressional Subcommittee charged with the responsibility of conducting public hearings on H.R. 3173 (the Act of August 4, 1947) evidenced that such restrictions insofar as half-bloods were concerned were unnecessary and

that members of the Five Civilized Tribes in Oklahoma had become fully integrated into the white man's society (Defendants' Exhibit No. 23) which this Court finds to be absolutely true and correct.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of all the parties hereto and of the subject matter of this action, and jurisdiction to enter a full and complete decree herein adjudicating all rights of the parties hereto.

2. The Court concludes as a matter of law that it is unnecessary to an adjudication of this cause for this Court to determine whether it has or does not have jurisdiction to approve or disapprove the conveyance of December 3, 1965 from plaintiff to defendant Becko or to determine whether to grant or withhold approval of such conveyance, although the effect of granting to either party the relief sought of quieting title to the subject real property may, by implication, constitute an affirmation or re-[1142]jection of the deed of December 3, 1965. By way of analogy, if the defendants herein were defending this quiet title action based on expiration of the applicable Oklahoma statute of limitations, this Court need not consider whether to approve or disapprove the deed but only whether or not the statute of limitations was, in fact, applicable. Viewed in this light, and in the light of the fact the plaintiff herself has invoked the equitable jurisdiction and powers of this Court, the issue of voluntary or involuntary consent to the proceedings, while being an issue in the State Court approval proceedings, is not an issue before this Court on the trial of this cause on its merits.

[1] 3. The Act of August 4, 1947 is unconstitutional as applied in this case for the reason that to strictly apply the Act to this case would violate the substantive due process rights of the defendants as guaranteed by the Fifth Amendment of the United States Constitution. To apply the 1947 Act so as to permit the plaintiff to void the deed in question and recover

the land and improvements thereon, will result in a violation of substantive due process for the reason that the actual operation of the means selected by Congress to achieve the purpose of the Act will not have a real and substantial relation to such purpose, and, in fact, such an operation of the means selected will thwart the intent and purpose of Congress.

[2] A statute or act of Congress may be held unconstitutional as applied and therefore void and unenforceable by virtue of its actual operation, when it operates to deprive one of a protected right, despite the fact that the general validity of the act or statute "as a measure enacted in the legitimate exercise of police power is beyond question". *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971); *Great Northern R. Co. v. Washington*, 300 U.S. 154, 57 S.Ct. 397, 81 L.Ed. 573 (1936).

[3] It is well established that the Fifth Amendment guarantee of due process of law conditions the exercise of legislative power by insuring "that the end shall be accomplished by methods consistent with due process". *Nebbia v. New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940 (1933). Further, the Fifth Amendment guarantee of due process of law requires that an act or statute "shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained." *Nebbia v. New York, supra.*

[4] The object and purpose of the acts and statutes regarding restrictions on alienation of Indian lands owned by members of the Five Civilized Tribes and the approval required thereby, is to place the Indian on an equal footing with non-Indians in the sense of business acumen and to insure that transaction concerning their restricted lands be conducted at arm's length. *Cotcha v. Ferguson*, 165 Okl. 295, 25 P.2d 767 (1933); *Critchlow, et al. v. Bacon*, 142 Olk. 168, 285 P.968 (1930). The logical corollary to this purpose, however, is that the acts are not for the purpose of providing the Indian with a means of asserting a fraudulent, inequitable and stale claim

and retreating from a business transaction entered into by other parties in good faith, long after valuable improvements have been placed on the property. That is, the acts are intended as a shield for the Indian, to protect against overreaching and incompetency, and not as a sword for the purpose of permitting an Indian covered thereby to perpetrate a fraud.

[5,6] It is of utmost importance for this Court to ascertain the purpose of the Act of August 4, 1947. It is the conclusion of this Court that the primary purpose of the Act of August 4, 1947 was to clarify, cure and stabilize Indian land titles in Northeast Oklahoma. Further, by placing the restrictions set forth in the Act of August 4, 1947, Congress also had as its purpose to again insure that the Indians of the Five Civilized Tribes covered by said Act would be placed on an equal footing with other in business transactions, and to insure that such Indians' transactions in regard to the restricted lands would be at arm's length and that there would not be overreaching. In interpreting statutes and acts, it is the duty of [1143] the court to "construe the language so as to give effect to the intent of Congress." *United States v. American Trucking Associations,* 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940). Further, in construing the statutes, the Court should take into consideration the "purpose, the subject matter, the context, the legislative history and executive interpretation" of the act or statute. *United States v. Cooper Corporation*, 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071 (1940). The words used by Congress in a statute or act are persuasive evidence of the purpose of such an act or statute; that when the meaning of such words lead to absurd results, the courts will look beyond the words to the purpose behind the act or statute. *United States v. American Trucking Associations, supra.* Further, the act or statute "cannot be divorced from the circumstances existing at the time it was passed, and from the evil which Congress sought to correct and prevent". *United States v. American Trucking Associations, supra.*

An examination of the Act of August 4, 1947 reveals that the means selected by Congress to achieve the above stated purposes is to invalidate deeds and conveyances covered by the Act, if such deeds and conveyances are not approved by the County Court of the appropriate county in Oklahoma. However, to apply the means selected in the instant case, and allow the plaintiff to void the deed and recover the subject property and the improvements thereon, would result in a violation of substantive due process of law for the reason that such an application would not have a real and substantial relation to the purposes and objects sought to be achieved by Congress in the 1947 Act. To apply the Act, such that the deed will be invalid, will not serve Congress' purpose of clarifying, curing and stabilizing Indian land titles in Northeastern Oklahoma. Further, such an application of the means selected would not further the Congressional purpose of protecting the plaintiff, as an Indian covered by said Act, from overreaching, and of insuring that the plaintiff was on an equal footing with the defendant Becko in the sale of the subject property on December 3, 1965 and that said sale was at arm's length and without overreaching, as the evidence shows that those purposes were, in fact, achieved in this case. The plaintiff is, and was at the time of entering into the various options leading up to the sale of the subject property, and the subsequent conveyance thereof to the defendant Becko, a competent individual, fully able to transact business on her own behalf. There was no evidence presented at trial that there was any undue influence, fraud, menace or duress practiced on the plaintiff during the course of the sales transaction with the defendant Becko. The consideration received by the plaintiff in the sale of the subject property to the defendant Becko on December 3, 1965, considerably exceeded the fair market value of the subject property on said date, and therefore, was a more than adequate and fair consideration. Further, the sale and conveyance of the plaintiff to the defendant Becko of the subject property was an arm's length transaction as evidenced by the fact that the plaintiff was represented by her experienced legal counsel, advised by tax counsel, and further, consulted the Bureau of Indian Affairs in regard to the tax aspects of the

sale. By virtue of the foregoing, this Court concludes as a matter of law, that the plaintiff was not overreached in the course of her sale of the subject property to the defendant Becko.

In light of the purpose of the Act of August 4, 1947, and further, in light of the means selected by Congress to achieve that purpose, it is the conclusion of this Court that an application of the means to the facts in this case would result in such an application not having a real and substantial relation to the object and purposes sought to be achieved by Congress. Applying the means selected by Congress in this case will not achieve the Congressional purpose, and further, such an application would, in fact, thwart the Congressional purpose and would violate the traditional concepts of fundamental fairness and justice.

[7] The Act of August 4, 1947, at most in this case, creates a rebuttable presump-[1144]tion that the Indian grantor covered thereby was incompetent, that the consideration received was unfair, and that said Indian was overreached. This presumption has been rebutted by the overwhelming evidence in this case. The plaintiff is and was at the time of entering into the various options leading to the sale of the subject property, and the subsequent conveyance thereof to the defendant H. Harold Becko, a competent individual, fully able to transact business on her own behalf. The consideration received by the plaintiff from the defendant Becko in regard to the sale of the subject property on December 3, 1965 was considerably in excess of the fair market value of the property at that time. The sale and conveyance by the plaintiff to the defendant Becko of the subject property was an arm's length transaction, and the plaintiff was not overreached nor was she under any undue influence, duress, menace or fraud in the course of her sale of the subject property to the defendant Becko.

4. This Court concludes that the Act of Congress of August 4, 1947 is unconstitutional as applied in this case for the reason that the Act, as applied, violates due process of law

as guaranteed by the Fifth Amendment of the United States Constitution by virtue of the fact that the Act is vague and uncertain in its application and, further, that there exists a lack of notice of the Act. An act or statute violates due process of law if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." *Cramp v. Board of Public Instruction,* 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); *Connally v. General Constr. Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1925). Further, an act or statute valid on its face may be unconstitutional as applied. *Boddie v. Connecticut, supra; Great Northern R. Co. v. Washington, supra.*

[8] The vagueness, uncertainty and indefiniteness of the Act of August 4, 1947 as applied in this case is first of all shown by reason of the fact that the Act creates an anomalous situation of requiring an individual utilizing the Act to refer to the prior Acts of Congress which created the confusion and uncertainty that the 1947 Act was intended to cure. The public hearings before the Subcommittee on Indian Affairs of the Committee on Public Lands of the House of Representatives reveals that one of the purposes of the Act of August 4, 1947 was to cure and clarify the confusion as to Indian land titles in Oklahoma created by prior acts of Congress. In order to determine whether the 1947 Act is applicable in a given situation, it must be determined whether the land was restricted in the hands of the Indian from whom the Indian heir or devisee acquired same. (Act of August 4, 1947, 61 Stat. 732). To so determine the restricted status of the Indian ancestor, one would be placed in the awkward position of having to refer to the very Acts which created the confusion sought to be cured by the 1947 Act, although the 1947 Act itself makes no reference as to how such determination is to be made. The Court concludes that this anomaly and omission renders the Act as attempted to be applied in this case so indefinite and uncertain as to be violative of due process of law under the Fifth Amendment of the United States Constitution.

The Act of August 4, 1947 is further vague and uncertain as to its application in this case for the reason that in determining whether an Indian heir or devisee vested with title to the property is subject to restrictions under the Act, the degree of Indian blood of the heir or devisee must be determined, and under the provisions of the Act, this cannot, in many situations, be ascertained. Section 2 of the 1947 Act sets forth the procedure for determining the degree of Indian blood for the purposes of the Act. (Act of August 4, 1947, 61 Stat. 732) Under Section 2 of the Act, if the Indian heir or devisee is enrolled, then there would be little problem in determining the quantum of Indian blood. However, if the Indian heir or devisee is unenrolled (the rolls of the Five Civilized Tribes were finalized and closed in 1906), the degree of Indian blood must be computed from the near-[1145]est enrolled paternal and maternal lineal ancestors of the Indian heir or devisee. It is in this latter situation that the determination of the degree of Indian blood becomes, in many cases, unworkable. The Act, in most situations, cannot be followed when dealing with second generation heirs or devisees, all of whom would be unenrolled. That is, after an inheritance from a first generation unenrolled heir, the degree of blood of the heir or devisee cannot be determined from the final rolls. That is, the title examiner must seek information as to the degree of blood of the Indian heir or devisee from sources outside of the rolls, and in many situations this information is unavailable. Information as to the degree of blood of the original allottee-ancestor's spouse would not appear in an abstract of title covering the allottee's land. The abstract of title covering the allottee's allotment would only contain instruments and documents pertaining to the allottee. Thus, probate decrees and the like in regard to the original allottee-ancestor's spouse would not appear in the abstract of title covering land from the allottee's allotment.

Further, it is the interpretation of the Office of the Solicitor of the Department of Interior that in determining the degree of Indian blood of the heir or devisee under the 1947 Act, the Act requires only that the degree of blood be from an

Indian from the Five Civilized Tribes. That is, any quantum of Indian blood from a tribe *other* than the Five Civilized Tribes is irrelevant to the determination of the degree of Indian blood under the 1947 Act. This again creates an anomalous situation for the reason that under this interpretation there could be a situation where the heir's or devisee's father was a three-quarter (3/4) blood Creek and the mother was a full-blood Apache Indian, and the heir or devisee would not be subject to the Act for the reason that said heir or devisee would only have a three-eighths (3/8) degree of Indian blood from the Five Civilized Tribes. Thus, an heir or devisee whose total quantum of Indian blood is seven-eighths (7/8) and who might possibly need the protection of the Act for the reason of incompetency, would not be afforded the protection of the Act.

Further compounding the uncertainty created by the difficulties in determining the degree of Indian blood for the purposes of determining the applicability of the Act, is the fact that the Act does not state where the final rolls of the Five Civilized Tribes are maintained or can be found. As stated above, in order to determine the degree of Indian blood under Section 2 of the 1947 Act, reference must be made to the final rolls of the Five Civilized Tribes regardless of whether the heir or devisee is enrolled or unenrolled. Without knowing where the rolls are maintained, it is difficult to see how the determination of the quantum of Indian blood can be accomplished.

The Court therefore concludes that the inability to determine with certainty the degree of Indian blood under the provisions of the 1947 Act, for the purpose of determining the Act's applicability, renders the Act so vague and uncertain in its application in this case as to be violative of due process of law under the Fifth Amendment of the United States Constitution.

[9-11] 5. The Court further concludes that the due process of law rights of the defendant as guaranteed by the Fifth Amendment of the United States Constitution were violated in the application to this case for the reason that

Congress did not provide any reasonable means by which the defendants or their attorneys could have acquired notice or knowledge of the existence or content of the Act. The Act of August 4, 1947 was never codified in the United States Code. (TR. 400) The text of the Act does not appear in the United States Code, and only "a mention of it" appears in a footnote in the United States Code (TR. 400) Further, the Act does not appear in United States Code Annotated. (TR. 400) Single publication of the passage of the Act by separate Houses of Congress in the U.S. Congressional Record in 1947 is not a reasonable means of communication to the general public (of which the defendants are a part) of continuing existence and [1146] content of this Act in the year 1965 when the defendant Becko purchased the subject property from the plaintiff. In fact, the Solicitor for the Department of Interior, Harold Shultz, evidences in his testimony the fact that many attorneys in Oklahoma learn of the existence of the Act from conversations with his office. The only notice of the Act of August 4, 1947 available to attorneys or members of the general public would be the mention of the Act in a footnote in United States Code, Semple, Oklahoma Indian Land Titles Ann., or by inquiry of the Solicitor's Office of the Department of Interior or if by chance a member of the general public or his attorney had access to one of the special treatises dealing with Indian land law, none of which is reasonable notice to defendants or the general public of the existence and content of this special legislation. There is no evidence in the record that the defendants had actual notice or knowledge of this Act or its contents prior to the filing of this action. It is well established that one of the primary elements of due process is that of notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Anderson National Bank v. Luckett*, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692 (1943). Therefore by virtue of the lack of notice of the existence or content of the Act, it is the conclusion of this Court that the defendants' rights of due process of law as guaranteed by the Fifth Amendment of the United States Constitution would be violated if the Act were applied to divest them of their title to the subject real

property under these facts and circumstances. It is no answer to say that everyone is presumed to know the law when the law in question is not contained in any official publication where laws of the enacting legislative body are normally found.

6. At the very least as to two-thirds of the interest which the plaintiff formerly held in the subject property, the due process of law rights of defendants guaranteed by the Fifth Amendment of the United States Constitution would be violated if the Act were applied by the cancellation of the deed of December 3, 1965 by plaintiff to defendant Becko because of lack of notice to the defendant Becko of the Act's applicability to such two-thirds interest. The Act of August 4, 1947 only places restrictions on those lands acquired by inheritance or devise from persons in whose hands the land was restricted at the time of such inheritance or devise. (Act of August 4, 1947, 61 Stat. 732)

In the instant case, the plaintiff acquired only a one-third interest in the subject property by actual inheritance, the remaining two-thirds of her interest in the subject property being acquired by her by means of a Quit-Claim Deed from her two brothers and their respective spouses in whose hands the land was not restricted at the time of the Quit-Claim Deed. Such Quit-Claim Deed recited it was given for One Dollar ($1.00) and other good and valuable consideration. (Defendants' Exhibit No. 10) Although there was testimony at the trial of this case that the Quit-Claim Deed to plaintiff from her brothers was the result of a voluntary partition of the 120-acre surplus allotment of Billy Atkins accomplished by exchange of Quit-Claim Deeds, the two Quit-Claim Deeds given by plaintiff in exchange for the Quit-Claim Deed to the 40-acre tract of which the subject property is a part would not and do not appear in the chain of record title to the subject property. As a matter of evidence in this case, only the Quit-Claim Deed to the plaintiff convering the 40-acre tract of which the subject property is a part appeared in the abstract of title furnished by plaintiff to defendant Becko for examination. The Quit-Claim Deed received by plaintiff from her two

brothers and their respective spouses covering said 40-acre tract makes absolutely no reference to partition or exchange of deeds but, in fact, recites that the same was given for One Dollar ($1.00) and other good and valuable considerations. Naturally, a judicially conducted partition of this surplus allotment would have appeared in the chain of title to the subject real property, but this was a voluntary, and not a judicial partition. There was no evidence introduced [1147] that any of the defendants or their predecessors in title to the subject property had any actual notice of the exchange of deeds or voluntary partition of the 120-acre tract. Because the abstract was totally devoid of notice of whether the plaintiff acquired two-thirds of her interest in the subject property by inheritance or devise, there was a total lack of notice of crucial factor which is determinative of the Act's applicability. It is well established that one of the primary elements of due process is that of notice. *Mullane v. Central Hanover Bank & Trust Co., supra; Anderson National Bank v. Luckett, supra.*

[12-14] 7. The nature of an action is determined by the pleadings. To confer equitable jurisdiction on the Court, the relief sought in the pleadings must be equitable in character. 27 Am.Jur.2d *Equity* §7, pg. 525. This suit is an action of equitable cognizance, the plaintiff and the defendants each in their respective pleadings having invoked the equitable powers and jurisdiction of this Court to quiet title to real property. The plaintiff also seeks to invoke the equitable powers and jurisdiction of this Court to invalidate and cancel of record a deed of conveyance given by her under date of December 3, 1965 to the defendant H. Harold Becko and further, for the cancellation of all instruments in the chain of title to the subject property given by the defendant Becko and his successors in title to the subject property. It is well established that an action to quiet title is one of equitable cognizance. *King v. Oakley*, 434 P.2d 868 (Okl. 1967); *Keith v. Lawson*, 195 Okl. 157, 155 P.2d 716 (1944). An action to cancel instruments of conveyance is also an action of equitable cognizance. *Clovis v. Clovis*, 460 P.2d 878 (Okl. 1969). Thus, because the relief being sought herein by both the plaintiff

and the defendants is of an equitable nature, it is concluded that this is an action in equity and as such, the rights of the parties hereto are governed by the established rules pertaining to suits in equity or of equitable cognizance. *Keith v. Lawson, supra.*

This action being in equity, this Court has broad power to accord such relief as is required by justice and equity, and as is required "to protect and conserve the equities of the parties litigant." 27 Am.Jur.2d *Equity* §103, pgs. 624-625. In an equitable action, a court has great flexibility and if the case requires the court to furnish an equitable remedy, the courts will provide one although the question presented is novel. 27 Am.Jur.2d *Equity* § 103, pg. 625. Further, once the equitable jurisdiction of a court has been invoked, the court will decide all issues which are relevant to the case, and the court is empowered to "award relief which is complete and finally disposes of the litigation so as to accomplish full justice between the parties litigant. . . ." 27 Am.Jur.2d *Equity* §108, pgs. 629-630.

[15] The plaintiff in this action has invoked the equitable jurisdiction of this Court seeking the benefits of equitable relief but at the same time contending that, unlike other citizens of the United States, equitable defenses may not be asserted against her nor rules of established equity jurisprudence applied to her detriment because she is of one-half (½) Indian blood. This contention is without merit. The plaintiff is a member of the Five Civilized Tribes. Members of the Five Civilized Tribes are treated substantially different in law than members of other tribes of Indians; they are governed by completely different and special legislation and are not governed by the Indian General Allotment Act, 25 U.S.C.A. §331, et seq. (Semple, Oklahoma Indian Land Titles, Ann., §730, pg. 517, Thomas Law Book Company; TR. 116), and, accordingly, and as stated by the Field Solicitor testifying herein, cases dealing with Indians governed by the Indian General Allotment Act are distinguishable from cases concerning members of the Five Civilized Tribes because,

in the former, a completely different set of laws would be construed. (TR. 116) Members of the Five Civilized Tribes, by treaty and by Congressional enactment, have been given the right and do hold fee title (sic) to their lands, while Indians governed by the Indian General Allotment Act are only vested with equita-[1148]ble title in their land with the legal title remaining in the United States, i.e., the lands are trust land. (Semple, Oklahoma Indian Land Titles Ann., §§55, 728; TR. 116) The plaintiff is not a restricted Indian for the reason that there is no such thing as a restricted Indian among the members of the Five Civilized Tribes. (TR. 103) Unlike Indians governed by the Indian General Allotment Act, the plaintiff is not a ward of the United States Government or any agency thereof, nor does she suffer from any incompetency or other legal disability which would shield her from the assertion of equitable defenses or application of rules of established equity jurisprudence. There is no act of Congress making members of the Five Civilized Tribes of one-half (½) blood wards of the United States Government or monies received by such Indians subject to management or control of the Bureau of Indian Affairs or the Department of the Interior or any other federal agency. Accordingly, this Court concludes as a matter of law that the plaintiff is subject to equitable defenses and the application of established rules of equity.

[16] 8. By legislative enactment, Congress, in 1926, made the Oklahoma statutes of limitation applicable to all Indians of the Five Civilized Tribes and against the heirs and grantees of such Indians. (Act of April 12, 1926, §2, 44 Stat. 240). In making the Oklahoma statutes of limitations applicable to members of the Five Civilized Tribes, it was Congress' intent to effectuate the same result as if the action had been brought by a non-Indian. *Wolfe v. Phillips*, 172 F.2d 481 (10th Cir. 1949). The underlying purpose of statutes of limitation is to prevent the unexpected enforcement of stale claims against those who have been misled by the lack of prosecution for a considerable period of time and, further, to promote diligence of prosecution. *Seitz v. Jones*, 370 P.2d 300 (Okl. 1962). Congress, in enacting the 1926 Act regarding

the statutes of limitation and the Five Civilized Tribes, has shown its intent to impose an obligation upon members of the Five Civilized Tribes, to diligently pursue their legal remedies and rights, and to prevent the inequities which result from the assertion of stale claims by such Indians.

[17] Like statutes of limitation, the equitable doctrine of laches also has as its purpose the discouragement of stale claims and the encouragement of diligence in prosecution. *Swartz v. Dennis*, 208 Okl. 334, 225 P.2d 923 (1953); 30A C.J.S. *Equity* §113, pg. 31. So close are the purposes sought to be accomplished by both the statutes of limitation and laches that courts of equity, which are not usually bound by statutes of limitation, will apply the statutes by analogy in equitable actions for the purposes of determining the applicability of laches. *Shell v. Strong*, 151 F.2d 909 (10th Cir. 1945). In light of the fact that the purposes of statutes of limitation and the equitable doctrine of laches are the same, it is concluded that the purpose of Congress in its 1926 Act to bar stale claims of the members of the Five Civilized Tribes can only be fully effectuated if the equitable doctrine of laches is likewise applicable.

[18] It is further concluded that cases holding that the doctrine of laches is not available in actions brought by Indians with respect to their restricted lands, are not dispositive in this case, for the reason that such cases either are concerned with Indians governed by the Indian General Allotment Act, 25 U.S.C.A. §330 et seq., and not Indians of the Five Civilized Tribes, or such cases were decided prior to the enactment of the Act of April 12, 1926. As to the cases decided prior to the enactment of the Act of April 12, 1926, the courts at that time did not have before them the Congressional intent reflected by the 1926 Act to impose an obligation on the members of the Five Civilized Tribes to diligently prosecute their legal rights and remedies concerning their restricted lands. Further, this Court does not feel that it is compelled to follow the Oklahoma Supreme Court case of *Smith v. Williams*, 78 Okla. 297, 190 P. 555 (1920), as authority that equitable remedies

are not available against Indians with respect to their restricted land. It is the conclusion of this Court that the Congressional intent [1149] reflected by the 1926 Act to require the members of the Five Civilized Tribes to diligently prosecute their legal rights and remedies concerning their restricted lands is such as to question the validity of the rule of that case insofar as the question of equitable defenses is concerned. It is this Court's conclusion that if the Oklahoma Supreme Court were confronted with the question of the applicability of laches and other equitable defenses in actions involving Indians of the Five Civilized Tribes, the Oklahoma Court, in light of the 1929 Act, would no longer adhere to the ruling of that case insofar as laches and other equitable defenses are concerned. Federal courts, when placed in the position of applying state law, are not necessarily bound "to follow state court decisions where it appears that a state court considering the identical issue would not rely on such precedent." *Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir. 1973); Compare: *Bernhardt v. Polygraphic Company of America*, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956); (See concerning opinion of Justice Frankfurter, 350 U.S. at 208-212, 76 S.Ct. 273) cf. Wright, Law of Federal Courts, §58, pgs. 238-239 (2d. Ed. 1970, West Publishing Co.).

The Court accordingly concludes that the equitable doctrine of laches may be asserted by the defendants as a defense in this case.

9. The application of the doctrine of laches depends upon the circumstances and equities of the particular case. *O'Brien v. Wheelock*, 184 U.S. 450, 22 S.Ct. 354, 46 L.Ed. 636 (1901); *Bechler v. Kaye*, 222 F.2d 216 (10th Cir. 1955). The issue of laches and the determination of whether the same is applicable, is within the sound discretion of the Court. 30A C.J.S. *Equity* §115 pgs. 30-40.

[9-21] To constitute laches, there must exist two basic elements: inexcusable delay in instituting suit; and prejudice or injury to the defendant as a result of inexcusable delay.

Alexander v. Phillips Petroleum Co., 130 F.2d 593 (10th Cir. 1942). There is no set or fixed time in regard to the determination of the doctrine of laches, and the length of delay must be determined from the circumstances of each case. 30A C.J.S. *Equity* §116 pg. 46; *Bechler v. Kaye, supra; Alsop v. Riker*, 155 U.S. 448, 15 S.Ct. 162, 39 L.Ed.218 (1894). The basic premise of the doctrine of laches is that it is applicable in cases where, by virtue of a lapse of time, it would be inequitable for a party to enforce his legal right, when such lapse of time has resulted in prejudice to the defendant. *Socony Mobile Oil Company v. Continental Oil Company*, 335 F.2d 438 (10th Cir. 1964). One of the primary elements in determining whether the delay is inexcusable, is whether the person against whom the doctrine is being asserted had knowledge of the facts which give rise to his or her cause of action. 27 Am.Jur.2d *Equity*, §166 pg. 709. Regarding the plaintiff's knowledge of the facts giving rise to his or her cause of action, the plaintiff is charged with such knowledge as could have been obtained upon inquiry, if such facts are such as to put a person of ordinary intelligence on inquiry. *Johnson v. Atlantic, G. &W.I. Transit Co.*, 156 U.S. 618, 15 S.Ct. 520, 39 L.Ed. 556 (1894). If such facts are known by the plaintiff, lack of knowledge of the applicable law will not ordinarily be an excuse for delay. *Alexander v. Phillips Petroleum Co., supra.*

[22] Applying the above stated law to the evidence presented on the trial of the merits of this case, the Court concludes that the plaintiff is guilty of laches and that the relief sought by her herein is barred thereby. The plaintiff delayed for an unreasonable period of time in asserting any claim to the subject real property (eight (8) years and approximately three (3) months) during which period the defendants in good faith and without knowledge of the plaintiff's claim and in reliance on the plaintiff's deed to the defendant Becko materially changed their position by developing the property and constructing substantial improvements thereon. Defendants have suffered considerable detriment as a result of the plaintiff's delay in asserting her

claim herein. The plaintiff had actual knowledge of such development and construction of substan-[1150] tial improvements. The plaintiff and her attorney likewise knew, or with reasonable diligence should have known, of the facts giving rise to the claim asserted herein at the time of her conveyance to the defendant Becko. Both the plaintiff and her attorney had knowledge of more than sufficient facts which would put an ordinary person on inquiry as to whether the land was restricted and as to whether the deed to defendant Becko need be approved. It is the conclusion of this Court that the plaintiff's delay in asserting her claim is inexcusable under all the facts and circumstances in this case.

[23, 24] 10. It is a firmly established rule of equity jurisprudence that he who seeks equity must do equity, that only conscience, good faith and diligence can put equity into operation, and that he who comes into equity must come with clean hands. *Luschen v. Stanton*, 192 Okl. 454, 137 P.2d 567 (1943); 30A C.J.S. *Equity* § 113 pgs. 32-33.

[25] Under all the evidence presented in the trial of this case, the Court concludes as a matter of law that the plaintiff has not sought to do equity herein and seeks to invoke the equitable aid of this Court possessed of unclean hands. Accordingly, the plaintiff may not obtain the equitable relief sought by her of quiet title and cancellation of instruments. The plaintiff's refusal to now consent to the approval of her December 3, 1965 deed to the defendant Becko is in bad faith. The plaintiff:

(1) has not sought to set aside any other conveyance by her of her restricted lands;

(2) has consented to approval of another conveyance of her restricted land to a third party not here involved after exacting payment from said third party as a condition to such consent;

(3) remained silent with regard to her claim herein while observing substantial improvements being made to the subject property by the defendants;

(4) admittedly received a fair price for the subject property, admittedly was competent during the entire transaction with defendant Becko, was admittedly advised by legal and tax counsel during the entire transaction with defendant Becko, admittedly executed, acknowledged and delivered the General Warranty Deed of December 3, 1965 and possession of the subject real property to defendant Becko as her free and voluntary act and deed;

(5) admittedly was not under any undue influence, fraud or duress;

(6) Admittedly delayed for over eight (8) years and until shortly after completion of the improvements by defendants to assert her claim.

The Court concludes that a literal application of the Act of August 4, 1947 in this case would result in substantial and unjust enrichment of the plaintiff and under the facts and circumstances of this case would do substantial violence to the concept of "fundamental fairness" which the Supreme Court of the United States has declared to be the cornerstone of due process of law guaranteed by the Fifth Amendment to the United States Constitution.

11. The Court concludes that the defendants Owen D. Young and Robert L. Latch, d/b/a Young & Latch Investments, a general partnership, are vested with legal and equitable title to, and are entitled to the peaceable possession of, Lots One (1), Two (2), and Three (3), Block One (1), and Lot Two (2), Block Two (2) of Maple Leaf Addition to the City of Broken Arrow, Oklahoma, according to the recorded plat thereof, and that the title and possession of said real property and the improvements thereon owned by said defendants should be quieted in said defendants against all claims or demands by the

plaintiff, Nellie Atkins Armstrong, her husband, Ruskin Armstrong, and those claiming, or to claim, by, through or under them or any of them. The Court further concludes that defendant Maple Leaf Apartments, Ltd. is vested with legal and equitable title to, and is entitled to peaceable possession of Lot One (1), Block Two (2) of Maple Leaf Addition to the City of Broken Arrow, Oklahoma, according to the recorded plat thereof, and [1151] that title and possession of said real property and the improvements thereon owned by said defendant should be quieted in said defendant as against all claims or demands by the plaintiff, Nellie Atkins Armstrong, the plaintiff's husband, Ruskin Armstrong, and those claiming, or to claim, by, through or under them or any of them.[1]

12. The Court further concludes that court costs herein expended should be taxed and assessed against the plaintiff, and that the defendants, and each of them, should have and recover judgment against the plaintiff, for the amount of court costs herein expended by each of such defendants respectively.

13. The Court further concludes that the receiverships herein should be dissolved, possession of the premises redelivered by the respective receivers in accordance with Conclusion of Law No. 11 above, said receivers discharged from their duties and responsibilities, and the funds currently held by said receivers should be deposited with the Court to be hereafter distributed pursuant to further order of this Court.

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[1] In its amended Order of February 24, 1975, relative to the issuance of a preliminary injunction in this cause, the Tenth Circuit Court of Appeals authorized and empowered this Court to adjust the equities between the parties at the trial of the cause on its merits. Under the evidence presented and issues raised at the trial on the merits of this cause, and in consideration of the above and foregoing findings of fact and conclusions of law of this Court, this Court concludes that a balancing or adjustment or (sic) the equitites between the parties is not warranted and that the exercise of such power extended this Court is not necessary.

JUDGMENT

The Court, on this 2nd day of August, 1977, filed in this cause its Findings of Fact and Conclusions of Law, which are hereby incorporated herein and made a part of this Judgment. Pursuant to such Findings of Fact and Conclusions of Law:

IT IS ORDERED, ADJUDGED AND DECREED that judgment be denied the plaintiff on each count and cause of action alleged by plaintiff in her Complaint and amendments thereto and that judgment be entered herein denying to plaintiff in its entirety the relief sought by her in her Complaint and amendments thereto.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants and cross-complainants, Owen D. Young and Robert L. Latch, d/b/a Young & Latch Investments, a general partnership, are the owners of and vested with full and complete legal and equitable title in and to the following described real property, together with all improvements thereon and rights and appurtenances thereunto belonging, located in Tulsa County, State of Oklahoma, to-wit:

> Lots One (1), Two (2) and Three (3), Block One (1), and Lot Two (2), Block Two (2), MAPLE LEAF ADDITION to the City of Broken Arrow, Tulsa County, Oklahoma, according to the recorded plat thereof,

and that said defendants and cross-complainants are entitled to the peaceable possession and quiet enjoyment of all said real property, improvements and appurtenances.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that title to the above described real property and all improvements thereon and rights and appurtenances thereunto belonging be and the same is hereby quieted and confirmed in the defendants and cross-complainants, Owen D. Young and Robert L. Latch, d/b/a Young & Latch Investments,

a general partnership, against any and all claims thereto of the plaintiff, Nellie Atkins Armstrong, and the third-party defendant herein, Ruskin Armstrong.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, Nellie Atkins Armstrong, and the third-party defendant, Ruskin Armstrong, and each of them, have no right, title, estate, lien, claim or interest in and to the above described real property, improvements thereon and rights and appurtenances thereunto belonging, or any part thereof, and that siad plaintiff and third-party defendant, and all those claiming or to claim by, through or under them, or any of them, be and they are hereby perpetually barred [1152] and enjoined from setting up or asserting any right, title, estate, lien, claim or interest in and to the above described real property and premises adverse to the title thereto of the defendants, Owen D. Young and Robert L. Latch, d/b/a Young & Latch Investments, a general partnership.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, Nellie Atkins Armstrong, and said third-party defendant Ruskin Armstrong, and all those claiming or to claim by, through or under them, or any of them, be and they are each hereby perpetually barred and enjoined from interfering with the possession and quiet enjoyment of the aforesaid real property and premises by the defendants and cross-complainants, Owen D. Young and Robert L. Latch, d/b/a Young & Latch Investments, a general partnership, and their tenants and all other persons claiming by, through or under said defendants and cross-complainants.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant and cross-complainant, Maple Leaf Apartments, Ltd., a limited partnership, is the owner of and vested with full and complete legal and equitable title in and to the following described real property, together with all improvements thereon and rights and appurtenances thereunto belonging, located in Tulsa County, State of Oklahoma, to-wit:

Lot One (1), Block Two (2), MAPLE LEAF ADDITION to the City of Broken Arrow, Tulsa County, Oklahoma, according to the recorded plat thereof,

and that said defendant and cross-complainant is entitled to the peaceable possession and quite enjoyment of all said real property, improvements and appurtenances.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that title to the real property last above described and all improvements thereon and rights and appurtenances thereunto belonging be and the same is hereby quieted and confirmed in the defendant and cross-complainant, Maple Leaf Apartments, Ltd., a limited partnership, against any and all claims thereto of the plaintiff, Nellie Atkins Armstrong, and the third-party defendant herein, Ruskin Armstrong.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, Nellie Atkins Armstrong, and the third-party defendant, Ruskin Armstron, and each of them, have no right, title estate, lien, claim or interest in and to the real property last above described, improvements thereon and rights and appurtenances thereunto belonging, or any part thereof, and that said plaintiff and said third-party defendant, and all those claiming or to claim by, through or under them, or any of them be and they are hereby perpetually barred and enjoined from setting up or asserting any right, title, estate, lien, claim or interest in and to the latter described real property and premises adverse to the title thereto of the defendant and cross-complainant, Maple Leaf Apartments, Ltd., a limited partnership.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, Nellie Atkins Armstrong, and said third-party defendant Ruskin Armstrong, and all those claiming or to claim by, through or under them, or any of them, be and they are each hereby perpetually barred and enjoined from interfering with the possession and quiet enjoyment of the last above described real property and premises

by the defendant and cross-complainant, Maple Leaf Apartments, Ltd., a limited partnership, and their tenants and all other persons claiming by, through or under said defendant and cross-complainant.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Robert L. Latch, the duly appointed trustee in possession of the following described real property situated in Tulsa County, State of Oklahoma, to-wit:

> Lot Two (2), Block Two (2), MAPLE LEAF ADDITION to the City of Broken Arrow, Tulsa County, Oklahoma, according to the recorded plat thereof,

be and he is hereby directed to immediately deliver peaceable possession of the latter described real property, together with all improvements thereon and appurtenances thereunto belonging, to the defendant, Maple Leaf Apartment, Ltd., a limited partnership. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that said trustee in possession be and he is hereby directed to render to this Court within fifteen (15) days from the date hereof a written account of his acts as trustee reflecting all receipts and disbursements by him with respect to such trusteeship and said trustee is further ordered and directed by this Court to immediately and forthwith deposit with the Clerk of this Court all monies in his possession received by him as trustee, the same together with all monies presently held by said Clerk as a part of the latter trusteeship to be hereafter distributed and disbursed pursuant to further order of this Court.

IT IS FINALLY ORDERED, ADJUDGED AND DECREED that the defendants and cross-complainants herein have and recover from the plaintiff judgment for all their costs herein expended.

A. 76

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1286

NELLIE ATKINS ARMSTRONG, Plaintiff-Appellant, v. MAPLE LEAF APARTMENTS, LTD., a Limited Partnership; BROKEN ARROW MALL, INC., a Corporation; OWEN D. YOUNG and ROBERT L. LATCH, d/b/a YOUNG & LATCH INVESTMENTS, a General Partnership; FIRSTTUL MORTGAGE COMPANY, a Corporation; SACKMAN-GILLIAND CORPORATION, a corporation; FIRST NATIONAL BANK & TRUST COMPANY OF TULSA, OKLAHOMA, a National Banking Association; and HAMILTON INVESTMENT TRUST, a Massachusetts Business Trust, Defendants-Appellees.	)	Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 74-C-119)

Jay C. Baker, Tulsa, Oklahoma (C. Rabon Martin and Christopher J. Grant, Tulsa, Oklahoma, on the brief), for Plaintiff-Appellant.

Royce H. Savage, Tulsa, Oklahoma, for Defendant-Appellee Maple Leaf Apartments, Ltd. (Chris L. Rhodes III, Tulsa, Oklahoma, James R. Ryan, Tulsa, Oklahoma, James D. Groves, Tulsa, Oklahoma, and Charles A. Whitebook, Tulsa, Oklahoma, on the brief), for Defendants-Appellees.

Before LEWIS, Chief Judge, and HOLLOWAY and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

(Filed December 12, 1974)

This appeal seeks reversal of a judgment which denied plaintiff a preliminary injunction incidental to an ejectment and quiet title action filed in the United States District Court for the Northern District of Oklahoma in which the plaintiff, a person of American Indian ancestry, sought to set aside a deed to land which had been alloted. Jurisdiction arises under 28 U.S.C. § § 1331 and 1353.

The embattled conveyance was executed on December 3, 1965. This did not end the matter because by Act of Congress the conveyance of restricted land requires approval to be obtained from the county court in Oklahoma for the county in which the land was situated. Act of August 4, 1947, 61 Stat. 731.

Originally, the subject land had been allotted to Billy Atkins, a full-blood Creek Indian and had been restricted against alienation by the Act of May 27, 1908, 35 Stat. 312. Atkins died in 1929 and 120 acres, which included the land involved in this action, descended to plaintiff and her two brothers. They, in turn, effected a voluntary partition of the tract, part of which is involved in this action. It is unclear from the evidence whether plaintiff had a full interest in the tract or merely a one-third interest, but this is unimportant here. The Act of Congress contains restrictions on the alienation of land acquired by devise or inheritance from Indians whose land had been restricted and is absolute in its requirement that the conveyance in order to be valid has to be approved in open court.[1]

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[1] The statute in question reads:

Plaintiff is unquestionably a one-half blood Creek Indian who meets the terms of the statute.

The evidence at the hearing established that plaintiff had first given the option to sell this property in 1964. Subsequently there was an assignment to H. Harold Becko who was named as a defendant only after he had filed a petition seeking approval of the conveyance. Very soon after she had executed the option, the plaintiff apparently entertained doubts about conveying the property. She consulted her then attorney who told her that she could not avoid conveying the property even in the face of the fact that one of the checks given for the option was dishonored. Notwithstanding her change of mind, she executed the warranty deed to H. Harold Becko on December 3, 1965 for a consideration of $107,100.

We have noted that the necessary approval of the county court was not obtained at the time of conveyance. At trial Mr. Petrik, the attorney who had represented plaintiff in connection

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(Footnote 1 continued):

> [The] petition for approval of conveyance shall be set for hearing not less than ten days from date of filing, and notice of hearing thereon, signed by the county judge, reciting the consideration offered and a description of the land shall be given by publication in at least one issue of a newspaper of general circulation in the county where the land is located and written notice of such hearing shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition is to be heard. *The grantor shall be present at said hearing and examined in open court before such conveyance shall be approved, unless the grantor and the probate attorney shall consent in writing that such hearing may be had and such conveyance approved in the absence of the grantor*, and the court must be satisfied that the consideration has been paid in full. (Emphasis added.)

Section 1(b), Act of August 4, 1947, 61 Stat. 731.

with the conveyance, testified that plaintiff would have asked the court not to approve the deed had she had an opportunity to do so. No such consent was then sought. The evidence further established that neither Mr. Petrik nor plaintiff knew of the restriction or the necessity for approval.

Becko conveyed the land to one C. H. Rosenstein, trustee, who quit-claimed to Manual Brown, who conveyed to Broken Arrow Mall, Inc., from which the present defendant Maple Leaf Apartments acquired its title. There has been substantial improvement since the original conveyance.

The action here was filed in the United States District Court for the Northern District of Oklahoma February 22, 1974, soon after appellant became aware that the land was restricted. Subsequently (on March 4, 1974), Becko instituted proceedings in the Probate Division of the District Court of Tulsa County, Oklahoma in which he sought to have the 1965 deed retroactively approved. The probate division ordered that the approval hearing would be conducted without competitive bidding. It issued a subpoena commanding the presence of plaintiff at the hearing. She did not, however, appear but filed a motion to dismiss March 12, 1974. Following this, the plaintiffs in the action, defendants-appellees here, sought a writ of attachment from the state district court and the judge of the probate division presently has under advisement the issuance of the requested warrant for Mrs. Armstrong's arrest. The District Court for the Northern District of Oklahoma denied plaintiff's motion for a preliminary injunction against the state court action. The court did not, however, dismiss the case. It retained jurisdiction over the ejectment suit pending the outcome of the state court proceedings. It is the denial of the preliminary injunction which is before us. Pending this appeal the parties have stipulated to hold the probate proceedings in abeyance.

I.

We first consider whether the pertinent statute allows the Oklahoma court to approve a conveyance of restricted land without the consent of and indeed over the protest of the Indian grantor of such land. If the statute allows this to be done it would then follow that the Oklahoma district court (probate division) would be entitled to proceed and that the federal district court's ruling denying the preliminary injunction was correct. We must hold that the denial of relief was not correct. In our judgment the court's approval of the conveyance cannot be given without the consent of or over the objection of the Indian grantor.

The statute itself considered in context with the general scheme of similar statutes dating back to 1906 defining and providing procedures for restrictions on Indian lands furnishes an initial answer. The major effect of the 1947 Act was to extend restrictions on lands held by full-blood Indians in the Five Civilized Tribes to half-blood Indians who had received the lands by devise or inheritance; the result is that the underlying policy applicable to full-blood Indians was extended to half-blood heirs.

Unquestionably the object of the restrictions was to protect the Indians from improvident dispositions resulting from overreaching by members of other races. Alonzo v. United States, 249 F.2d 189 (1957), *cert. denied*, 355 U.S. 940 (1958).[2]

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[2] *See also* Sunderland v. United States, 266 U.S. 226 (1924); United States v. Bowling, 256 U.S. 484 (1921); Heckman v. United States, 224 U.S. 413 (1912); Goddard v. Frazier, 156 F.2d 938 (10th Cir. 1946), *cert. denied*, 329 U.S. 765 (1946); Drummond v. United States, 131 F.2d 568 (10th Cir. 1942).

There is little recorded legislative history. There were hearings, however, before the House Public Land Committee which were not printed. These are described by W.F. Semple in his book, Oklahoma Indian Land Titles 811 (1952). In commenting on the procedure to be followed in the 1947 Act, Semple states that a first step is the filing in the county court (which was then the proper court) of a verified petition signed by the grantors "asking for approval."[3]

The statute itself is not complex. It calls for prompt hearing, for recitation of the amount of the consideration and for a description of the land to be contained in a public notice. A further requirement is that the grantor shall be present at the hearing and shall be examined in open court. Still a further proviso is that this presence can be obviated if the grantor and the probate attorney consent in writing. In such a case the hearing and approval may be had in the absence of the grantor.

Every provision of this statute deals with the rights of the grantor. There is no provision which suggests that the grantee can obtain an approval from the judge in the absence of or over the objection of the grantor. Maple Leaf's argument is that the Act gives the state court exclusive jurisdiction to grant or withhold approval. From this it is reasoned that the court has authority to grant approval even if the grantor is compelled to be present. They thus view presence as a token presence. We disagree. Such a ruling would run counter to the purpose, the spirit and for that matter the language of the statute. This Act of Congress contains no provision to relieve the grantee. It does not contemplate having an adversary hearing and what would amount to a specific performance decree

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[3] Semple, who helped draft the 1947 Act, obviously did not contemplate that the court could approve a conveyance over the Indian grantor's objection. The thread which runs through all of his discussion of the law pertaining to Indian lands is protection of the Indian against the excesses of the white man.

in the state court. It is designed to have a court ascertain whether advantage had been taken of the Indian. It contemplates that the Indian or the probate attorney would ask for the approval soon after the contract to convey was made.

We do not say that the lapse of time between the conveyance and the requested approval in and of itself constitutes an impediment. Snell v. Canard, 95 Okla. 145, 218 P. 813 (1923), *appeal dismissed*, 267 U.S. 578 (1925); Hope v. Foley, 57 Okla. 513, 13 P. 727 (1916). As shown here, it does have a practical consequence. The failure to seek the approval at the very time of the proposed conveyance creates a problem like the present one.

Expert testimony given by the Field Solicitor for the Department of Interior is, however, very significant. This witness testified that in his experience and to his knowledge such a deed had never been approved over the objection of the Indian grantor. He added that in his experience when an Indian grantor notified the court that he did not wish to approve the deed the court customarily immediately dismissed the case. He further said that the Department's interpretation of the Act was that the consent of the Indian was essential to approval by the court.

Furthermore, the Department of Interior's construction has been approved in a closely analogous situation by the Court of Appeals for the Ninth Circuit in Bacher v. Patencio, 232 F. Supp. 939 (S.D. Cal. 1964), *aff'd per curiam*, 368 F.2d 1010 (9th Cir. 1966), a decision which expresses our view. The district court there said:

> From the complaint's own allegations it seems clear that either an expressed or implied term and condition of the Area Director's approval of the arrangement to sell Patencio's land was that Patencio himself remain willing to receive the fee patent up to the time of its actual issuance and delivery to him. . . [I]t has been decided that where a fee

> patent is issued without the application or consent of the Indian it is invalid and cancellable. . . . In the case now before this Court Patencio applied for the patent, but if it is now issued it will be against his will, since that application has been withdrawn. The beneficent attitude of the United States toward its Indian wards is reason enough for refusal to issue fee patents without consent.

232 F. Supp. at 943-33.

Finally, the requirement of court approval would be rendered meaningless if it could be circumvented by compelling the Indian to be present against his will or by approving the deed even though the Indian grantor refused to give consent.

Accordingly, we must hold, considering the language of the statute, its history and purpose, that neither forced appearance nor approval over the grantor's objection is permissible.

II.

We next consider whether a federal court injunction should have issued prohibiting the proceedings in Oklahoma probate court. Defendants-appellees' position is that the federal court lacked jurisidiction to enjoin the proceedings in the probate court. Plaintiff, on the other hand, contends that there was an abuse of discretion in the refusal to grant the relief. We conclude that an injunction should have been issued for the following reasons:

First, the Act of Congress, 28 U.S.C. §2283, which prohibits federal court injunctions to stay proceedings in state court except as authorized by Act of Congress or where necessary in aid of the court's jurisdiction or to protect or effectuate its judgments is not applicable for the reason that the

probate division acting under the 1947 statute is not performing a state judicial function. Instead it is fulfilling a federal ministerial or administrative function. *See* Parker v. Richard, 250 U.S. 235 (1919); Springer v. Townsend, 336 F.2d 397 (10th Cir. 1964); United States v. Goldfeder, 112 F.2d 615 (10th Cir. 1940); United States v. Easley, 33 F. Supp. 442 (E.D. Okla. 1940). In *Springer* we concluded that the probate division of the court acts as a federal instrumentality and functions in an administrative rather than a judicial capacity. Hence, an important requisite of the Anti-Injunction Act is not present. *Cf.* Roudebush v. Hartke, 405 U.S. 15, 20 (1972).

Second, contrary to the alternative argument of defendants-appellees, the doctrine of primary jurisdiction is not applicable because the federal district court and the probate division do not both have jurisdiction over the subject matter and this condition is essential to application of the primary jurisdiction doctrine. *See* 3 K. Davis, Administrative Law Treatise § 19.01 (1958).

The sole question is whether the probate division is acting in excess of its jurisdiction. This issue of law involves a federal statute and is thus federal in nature. Thus, the federal court is an appropriate tribunal to decide it. Moreover, the probate division is not entitled to determine whether it has initial jurisdiction. *Cf.* MacAuley v. Waterman S.S. Corp., 327 U.S. 540 (1946). In *MacAuley* there was a question of fact to be determined by the administrative tribunal. Here, however, as we have noted, the issue is purely legal, an interpretation of an Act of Congress, and the federal district court is highly qualified to perform this function. We must conclude that it is for the federal court to decide whether the statute allows the proceedings to be held over the objections of the Indian grantor. On the other hand, the probate division is restricted to inquire as to whether the transaction was fair to the consenting Indian.

Third, the Act of Congress is subject to interpretation that there is no appeal for the plaintiff-appellant from the probate division. The only express provision is granted to the probate

attorney. This would mean that the Indian would have to resort to an extraordinary writ which would create an unfair impediment.[4]

There exists, then no legal obstacle to the granting of injunctive relief prohibiting the proceedings in the Probate Division in the District Court for the County of Tulsa, Oklahoma.

We are mindful that this is somewhat inequitable to Maple Leaf. In its present posture the plaintiff-appellant, who has not returned the purchase price, would succeed in having title to the land. This question is not before us, but undoubtedly the district court can on remand and in connection with its ejection suit on its merits adjust the equities between these parties.

III.

ABUSE OF DISCRETION IN DENYING PRELIMINARY INJUNCTION

The trial court found that plaintiff had not sustained the burden of establishing circumstances warranting the granting of a preliminary injunction.

Relief was denied because: 1) construction on the property has been halted to the financial detriment of some of defendants - - to grant the injunction would cause further financial loss to defendants and to deny it would not cause substantial financial loss to plaintiff; 2) plaintiff failed to convince the court that the state proceedings cannot proceed over her objection; 3) plaintiff has adequate remedies available in

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[4] This lack of express right to appeal bolsters our conclusion that the probate division has no authority to entertain an adversary proceeding such as that which Maple Leaf would seek to have it entertain.

the state court, including the right to appeal; and 4) the state court should be allowed to perform its function under the Act.

In Crowther v. Seaborg, 415 F.2d 437 (10th Cir. 1969) this court said:

> The application for a preliminary injunction is directed to the judicial discretion of the trial court. Before an appellate court may set aside that court's action, the appellate court must be able to say that the trial court's action, as a matter of law, was clearly erroneous or that it was the result of an improvident exercise of judicial discretion. . . . In hearings upon motions for temporary or preliminary injunctive relief, the burden is upon the one requesting such relief to make a prima facie case showing a reasonable probability that he will ultimately be entitled to the relief sought. The applicant has the additional burden of showing a right to the specific injunctive relief sought because of irreparable injury that will result if the injunction is not granted. There must exist a probable right and a probable danger.

415 F.2d at 439.

Plaintiff here has shown a probable right and a probable danger. The trial court correctly found that approval of the deed is a condition subsequent to its validity. Pickering v. Lomax, 145 U.S. 310 (1892). We have concluded that a proper construction of the 1947 Act prohibits the state court hearing from proceeding over the objections of the grantor.

If the state court were to act over the objection of Mrs. Armstrong, it would be acting outside the law and without jurisdiction. Eventually there could be a correction of an invalid approval of the deed, but this would occur only after much

appealing and perhaps a collateral attack in federal court. Such appeals might prove futile because there is no clear provision for appeal.[5]

The trial court found that some of defendants are suffering substantial financial loss as a result of the pendency of this action. We are painfully aware of this. Certainly an injunction which prohibits them from even seeking retroactive approval of the deed will cause further loss. But approval of the deed is essential to their having a right or interest in the property. A deed without this requisite approval conveys no interest in the land. Grisso v. United States, 138 F.2d 996 (10th Cir. 1943). Thus, defendants' losses are a result of their reliance on a deed conceded to be invalid at this time.[6] The grant of a preliminary injunction would cause cognizable injury to defendants only if the state district court could legally grant approval of the deed over the objection of and without the presence of Mrs. Armstrong. Since the Act precludes even the holding of the hearing over the objection of the Indian grantor, defendants' losses cannot be considered as a substantial factor in the decision to grant a preliminary injunction.

It is apparent that the grounds on which the trial court denied the injunction are without foundation. Plaintiff has shown both a probable right and a probable danger, and there is no competing interest asserted by defendants sufficient to justify a denial of the injunction.

The judgment of the district court is reversed and the cause is remanded for further proceedings consistent with the views expressed herein.

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[5] The 1947 Act allows the probate attorney to appeal a decision of approval to the next appellate court (*see*, 25 C.F.R. §16.7 (1974)). It is not clear whether other parties are entitled to appeal.

[6] *See* McCurtain v. Palmer, 121 F.2d 1009 (10th Cir. 1941); United States v. Brown, 8 F.2d 564 (8th Cir. 1925), *cert. denied*, 270 U.S. 644 (1926) holding that unapproved deeds must be cancelled whether or not the conveyances were made in good faith and for adequate consideration.

LEWIS, Chief Judge, dissenting. No. 74-1286

This appeal asks us to interpret the Act of August 4, 1947, ch. 458, 61 Stat. 731. Concededly, the Act is no model of clarity. Whether it requires the appropriate Oklahoma county court, acting in an exclusive delegated statutory capacity,[1] to divine the grantor's "consent," or whether it requires that court to determine whether the conveyance was for adequate consideration and thus not a product of overreaching, is unclear. And neither the legislative history nor the case law, sparse as it is, provides much assistence. Nevertheless, whether such doubt be resolved in the plaintiff's favor or not, I cannot conclude that it is necessary to the preservation of plaintiff's rights that her motion for a preliminary injunction be granted. If, under the Act, the grantor's objection - -made for whatever reason, or for no reason, and made at any time- -is sufficient cause to require the Oklahoma court to refuse to approve the conveyance, then the plaintiff's remedy in that court is complete and no reason for the preliminary injunction appears. If, on the other hand, the Act requires that the Oklahoma court investigate the objective equities of the conveyance- -rather than the subjective state of mind of the grantor- -, then, again, no reason appears for the preliminary injunction, for no irreparable injury could result lest we hold that such injury could occur from the performance by the Oklahoma court of its duties under the Act. That I am unwilling to do, and I must therefore respectfully dissent.

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[1] The Act of August 4, 1947, ch. 458, §1(b), 61 Stat. 732, provides, in part, that "[p]roceedings for approval of conveyances be restricted heirs or devisees under this section shall not be removable to the Federal court. . . ."

JANUARY TERM - FEBRUARY 24, 1975

Before Honorable David T. Lewis, Chief Judge, Honorable Delmas C. Hill, Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, and Honorable William E. Doyle, Circuit Judges

NELLIE ATKINS ARMSTRONG, Plaintiff-Appellant,	)
v.	)
MAPLE LEAF APARTMENTS, LTD., A Limited Partnership, et al., Defendants-Appellees.	) No. 74-1286

The Court, upon its own motion, amends and reissues the Order entered February 21, 1975, to read as follows:

This matter comes on for consideration of two separate petitions for rehearing with suggestion for rehearing en banc filed by the various appellees in the captioned cause.

Upon consideration whereof, the motion for rehearing is denied. We call attention to the fact that we recognized in our majority opinion that at the trial of the case on the merits, the trial court will be empowered to adjust the equities by charging appellants and crediting appellees for the amount that was originally paid to appellant for the purchase of the property, and the Court may consider issues raised as to the improvements.

Chief Judge Lewis would grant the motion for rehearing.

The petition for rehearing having been denied by the original panel consisting of Circuit Judges Lewis, Holloway, and Doyle, to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on

the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips
Clerk

A true copy Tests

Howard K. Phillips
Clerk, U.S. Court of
Appeals, Tenth Circuit

By:

/s/ Anne Cabet
Deputy Clerk

MAY TERM - May 15, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay and Honorable James K. Logan, Circuit Judges

NELLIE ATKINS ARMSTRONG,
Plaintiff-Appellant,

vs.

MAPLE LEAF APARTMENTS, LTD., a limited partnership; BROKEN ARROW MALL, INC., a corporation; OWEN D. YOUNG and ROBERT L. LATCH, d/b/a YOUNG & LATCH INVESTMENTS, a general partnership; FIRSTTUL MORTGAGE COMPANY, a corporation; SACKMAN-GILLILAN CORPORATION, a corporation; FIRST NATIONAL BANK & TRUST COMPANY OF TULSA, OKLAHOMA, a national banking association; and HAMILTON INVESTMENT TRUST, a Massachusetts business trust; ABERCROMBIE, PEDIGO and SMITH, INC.; H. HAROLD BECKO,
Defendants-Appellees,

RUSKIN F. ARMSTRONG, husband of Nellie Armstrong and MANUEL BROWN; C.A. WHITEBOOK,
Third-Party Defendants-Appellees,

CREEK NATION OF OKLAHOMA, U.S.A.,
Amicus Curiae.

No. 77-1680

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by Chief Judge Seth and Circuit Judge Holloway to whom the case was argued and submitted. Circuit Judge McKay, also on the hearing panel, dissented in the opinion filed May 17, 1979.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rules 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS, Clerk

/s/ Robert L. Hoecker
By: Robert L. Hoecker
Chief Deputy Clerk

SEPTEMBER TERM - November 4, 1975

Before Honorable Delmas C. Hill, Honorable William J. Holloway, Jr., and Honorable William E. Doyle, Circuit Judges

NELLIE ATKINS ARMSTRONG, Petitioner, vs. ALLEN E. BARROW, Chief United States District Judge for the Northern District of Oklahoma; MAPLE LEAF APARTMENTS, LTD., a limited partnership; BROKEN ARROW MALL, INC., a corporation; OWEN D. YOUNG and ROBERT L. LATCH, d/b/a YOUNG & LATCH INVESTMENTS, a general partnership; FIRSTTUL MORTGAGE COMPANY, a corporation; SACKMAN-GILLIAND CORPORATION, a corporation; FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, OKLAHOMA, a national banking association; HAMILTON INVESTMENT TRUST, a Massachusetts business trust; and ABERCROMBIE, PEDIGO & SMITH, INC., Respondents.	)	No. 75-1632

This matter comes on for consideration of a petition for writ of mandamus, prohibition or other extraordinary relief.

Upon consideration whereof, it is ordered that the petition for writ of mandamus, prohibition or other extraordinary relief is denied.

The Clerk shall certify a copy of this order to the Clerk of the United States District Court for the Northern District of Oklahoma as and for the mandate of this Court.

/s/ Howard K. Phillips
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

NELLIE ATKINS ARMSTRONG, Plaintiff,	)	
vs.	)	
MAPLE LEAF APARTMENTS, LTD., A Limited Partnership; BROKEN ARROW MALL, INC., A Corporation; OWEN D. YOUNG and ROBERT L. LATCH, d/b/a YOUNG & LATCH INVESTMENTS, A General Partnership; FIRSTTUL MORTGAGE COMPANY, A Corporation; SACKMAN-GILLIAND CORPORATION, A Corporation; FIRST NATIONAL BANK & TRUST COMPANY OF TULSA, OKLAHOMA, A National Banking Association; and HAMILTON INVESTMENT TRUST, a Massachusetts Business Trust, Defendants.	)	No. 74-C-119

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 3, 1974)

This cause came on for hearing and the Court, having heard the evidence and considered the stipulation of the parties, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. This is an action in the nature of ejectment and quiet title by plaintiff, who, in 1965, owned and occupied a certain tract of land located in Tulsa County, Oklahoma. The Court accepts and therefore finds as true all stipulations made in open court by counsel for the various parties on all hearings heretofore had. On December 3, 1965 plaintiff, a Creek Indian of half-blood, conveyed the real estate involved in this action to

the defendant Becko and since that conveyance other defendants have obtained interest in such real estate. The plaintiff asserts that under the Act of Congress of April 4, 1947 (61 Stat. 732, hereinafter referred to as the "1947 Act") her 1965 deed to Becko was a nullity and title never passed from her and that she is entitled to possession of the property. Following the filing of this suit, the defendant Becko filed a Petition in the District Court of Tulsa County, Probate Division, for approval of the 1965 deed under the 1947 Act. Thereafter, plaintiff herein sought to enjoin petitioner in the State Court from proceeding in that court for approval of the 1965 deed.

2. The 1965 deed has not been approved by the County Court (now Probate Division of the State District Court) of the county in which the land is situated.

3. The Court has considered each of the criteria for determining whether a preliminary injunction should be granted and finds that plaintiff has not sustained the burden of showing circumstances which would warrant the granting of a preliminary injunction.

4. The pendency of this action caused all construction on the land involved to be temporarily halted and is causing substantial damage to certain of the defendants herein.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and subject matter by reason of 28 U.S.C. §1331.

2. The Act of Congress of August 4, 1947 (61 Stat. 732) applies to the land involved herein.

3. Under the Act of Congress of August 4, 1947 (61 Stat. 732), and part of §16 of the Code of Federal Regulations, the Oklahoma State District Court, Probate Division, is designated by Congress as the sole tribunal to approve or disapprove a deed to land restricted by the 1947 Act.

4. Approval of (sic) disapproval of deeds under the 1947 Act is a ministerial or administrative function of the State District Court, acting as a federal instrumentality. *Springer vs. Townsend*, 336 F.2d 397 (10th Cir., 1964).

5. Upon a proper showing, the United States District Court can enjoin the State District Court while acting in such ministerial or administrative capacity. *Roudebush vs. Hartke*, 405 U.S. 15.

6. The criteria to look to in determining if a preliminary injunction should be granted are as follows:

A. The significance of threat of irreparable harm to the plaintiff if the injunction is not granted.

B. The state of the balance between this harm and the injury that granting the injunction could inflict on the defendants.

C. The probability that the plaintiff will succeed on the merits.

D. The relative hardship if the injunction is granted.

E. The public interest; that is, will it be affected.

A preliminary injunction is an extraordinary remedy, and whether an application for preliminary injunction is to be granted or denied is addressed to the discretion of the Court.

7. No law or case is found requiring the grantor to be the person seeking approval by the State Probate Court.

8. Approval of a deed to restricted Indian land is a condition subsequent. *Pickering vs. Lomax, et al.*, 145 U.S. 310, 12 S. Ct. 860 (1892).

9. Adequate remedies are available to plaintiff in the State Court action pending, including the right to appeal. The Court must assume that the District Court, as the designated instrumentality of the Congress, will act in accordance with the guide lines prescribed in the 1947 Act to protect the Indian and will have a full evidentiary hearing, including a full and adequate investigation of this matter, taking into consideration, among other things, the value of the property at the time it was conveyed.

10. It would be premature for this Court to enjoin the State District Court before it has had an opportunity to perform its function as designated by the Congress in the action there pending.

11. The question of whether plaintiff must first exhaust her administrative remedies in the State Probate Court has been considered. However, a decision of that legal issue is not required by the Court at this time because preliminary injunction is denied on the other grounds stated above.

IT IS SO ORDERED, and counsel for plaintiff will submit appropriate judgment in accordance herewith.

DATED: May 3, 1974.

/s/ Allen E. Barrow
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ Jay C. Baker
Attorney for Plaintiff

/s/ Royce H. Savage

/s/ Chris Rhodes
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

NELLIE ATKINS ARMSTRONG, Plaintiff	)	
vs.	)	No. 74-C-119
MAPLE LEAF APARTMENTS, LTD., a Limited Partnership; et al., Defendants.	)	

ORDER DENYING PRELIMINARY INJUNCTION
(Filed May 3, 1974)

This cause came on to be heard on plaintiff's motion for a preliminary injunction, and the Court having considered affidavits in support of said motion and in opposition thereto, and having heard oral evidence in open Court, and the Court having made and filed its findings of fact and conclusions of law, it is

ORDERED that said motion be and the same hereby is denied.

DATED: May 3, 1974.

/s/ Allen E. Barrow
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

NELLIE ATKINS ARMSTRONG, Plaintiff,	)	
vs.	)	
	)	74-C-119
MAPLE LEAF APARTMENTS, LTD., a Limited Partnership, et al., Defendants.	)	

ORDER

(Filed September 5, 1975)

The Court has for consideration the Affidavit of Prejudice executed and filed by *Jay C. Baker, counsel for plaintiff*, on the *25th day of August, 1975*, and the Supporting Affidavit of Prejudice, executed by *Nellie Atkins Armstrong, plaintiff*, filed *August 27, 1975*, and, being fully advised in the premises, finds:

This case was originally appealed to the United States Court of Appeals, Tenth Circuit (Armstrong v. Maple Leaf Apartments, et al. (10th CCA, 1975) 508 F.2d 518) on an interlocutory appeal from the denial of plaintiff's request for a preliminary injunction. The Court was reversed by a divided Court and the matter was remanded to this Court. The Court said:

> "***In its present posture the plaintiff-appellant, who has not returned the purchase price, would succeed in having title to the land. This question is not before us, but *undoubtedly the district court on remand and in connection with its ejection suit on its merits adjust the equities between these parties*." (Emphasis supplied)

This Court ordered that an appraisal be made of the property involved, with the appraisal to cover the following:

1. The value of the property at the time of sale (12/3/65):

2. The value of the property, less and except any improvements thereon, as of February 22, 1974;

3. The value of the property, with improvements, as of February 22, 1974.

The Report of the Appraisers was filed *August 25, 1975.*

The two Affidavits involved at the present time were inadvertently not called to the Court's attention until the 5th day of September, 1975.

Section 144 of Title 28 U.S.C.A., provides:

> "Whenever *a party to any proceeding* in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> "The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith." (Emphasis supplied)

The original affidavit filed by counsel for plaintiff, Jay C. Baker, is insufficient on its face without regard to the statements contained therein. The statute is explicit that the affidavit must be filed by a party to the action. Martelli v. City of Sonoma (USDC, N.D. Calif., 1973) 359 F. Supp. 397; Giebe v. Pencs (9th CCA, 1970) 431 F.2d 942. Jay C. Baker is not a party to the action.

The Court notes that plaintiff's attorney, Mr. Baker, attempts to file an affidavit by Mrs. Armstrong in an endeavor to correct his improper filing, by incorporating his statement in her affidavit, filed some 2 days later. In other words, he attempts to adopt language from an instrument not properly filed.

As stated above, the appraisal was filed on August 25. On the same date Mr. Baker filed his Affidavit of Prejudice. The Court, after receiving the appraisal and some 2 days later on August 27, overruled plaintiff's motion for summary judgment; overruled defendant's motion for a three-judge court, and ruled on various and sundry motions. At this time the Court had not been apprised of the filing of the Affidavit of Prejudice of Mr. Baker. On the same date the Court entered its orders on the motions, Mr. Baker filed Mrs. Armstrong's affidavit in an apparent attempt to rectify his previous error.

Assuming arguendo that there might be merit to the affidavit, the Court will now scrutinize Mrs. Armstrong's affidavit filed August 27, 1975, wherein the attempt is made to comply with the law to ascertain if the plaintiff has sustained the burden on the timeliness of filing and the sufficiency of the affidavit.

The Court will now examine the timeliness of the filing and the sufficiency of the affidavit to recluse presently pending in this Court.

The Court will turn first, to the legal sufficiency of the affidavit under consideration. Case law is replete that the Court not consider the truthfulness of the Affidavit.

The reasons and facts for the belief the litigant entertains are an essential part of the affidavit, and must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment. Martelli v. City of Sonoma, supra.

The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned fom his participation in the case. United States v. Grinnel Corp. (9th CCA 1968) 396 F.2d 331.

Rulings aaverse to the litigant are not sufficient. Palmer v. United States (10th CCA, 1957) 249 F.2d 8, cert. den. 356 U.S. 914.

Taking all of the allegations of the affidavit as a whole, the Court finds that the conduct alleged therein is legally insufficient to show bias or prejudice. The affidavit so failing, the Court need not turn to the timeliness of the filing.

The Court will, therefore, treat the affidavit of plaintiff, Nellie Atkins Armstrong, as a Motion to Recluse pursuant to 28 U.S.C.A. Section 144 and denies same.

IT IS SO ORDERED.

ENTERED this 5th day of September, 1975.

/s/ Allen E. Barrow
CHIEF UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NELLIE ATKINS ARMSTRONG, Petitioner,	)
vs.	)
ALLEN E. BARROW, Chief United States District Judge for the Northern District of Oklahoma; MAPLE LEAF APARTMENTS, LTD., a Limited Partnership; BROKEN ARROW MALL, INC., a Corporation; OWEN D. YOUNG and ROBERT L. LATCH, d/b/a YOUNG & LATCH INVESTMENTS, a General Partnership; FIRSTTUL MORTGAGE COMPANY, a corporation; SACKMAN-GILLIAN CORPORATION, a corporation; FIRST NATIONAL BANK AND TRUST COMPANY OF TULSA, OKLAHOMA, a National Banking Association; HAMILTON INVESTMENT TRUST, a Massachusetts Business Trust; and ABERCROMBIE, PEDIGO & SMITH, INC., Respondents.	) No. 75-1632

PETITION FOR WRIT OF MANDAMUS, PROHIBITION OR OTHER EXTRAORDINARY RELIEF

(Filed September 8, 1975)

Comes now Nellie Atkins Armstrong, by her undersigned attorneys, and petitions this Honorable Court for the issuance of a writ of mandamus, a writ of prohibition, or such other relief as Honorable Court may deem appropriate under the given circumstances, directing the Honorable Allen E. Barrow, Chief Judge of the United States District Court for the Northern District of Oklahoma, to disqualify himself from

further proceedings in the case now pending before him in the United States District Court for the Northern District of Oklahoma, styled Nellie Atkins Armstrong, plaintiff, vs. Maple Leaf Apartments and the remaining respondents above names, with the exception of said judge, and numbered 74-C-119; further prohibiting said judge from issuing further orders or taking other actions in the case; and directing that all orders issued by said judge subsequent to the plaintiff filing her affidavit of prejudice therein.

I. SYNOPSIS OF LITIGATION.

On February 22, 1974 the plaintiff, a one-half-blood Creek Indian heir, commenced this proceeding to eject the defendants from her restricted lands and quieting title to the property in her name. The plaintiff's claim for relief was based upon the Act of Congress of August 4, 1947 which, in substance, provides that a purported conveyance executed by the plaintiff to the defendants' predecessors in title in 1965, but not approved by the County Court of Tulsa County, Oklahoma, where the land is located, is void. Shortly thereafter, the defendants filed an action in the District Court of Tulsa County to have the deed retroactively approved. The plaintiff countered by asking the Federal Court to issue a preliminary injunction to halt the state Court proceedings, contending that such proceedings could not be maintained without her consent.

The plaintiff's application for a preliminary injunction was denied by the trial judge, and an appeal was taken to this Honorable Court, whose decision is reported at 508 F. 2d 518, rendered December 12, 1974. A petition for rehearing was denied February 26, 1975, and no writ of certiorari was sought in the United States Supreme Court and the opinion became final ninety days thereafter.

To date, but a single hearing has been had in the case. On May 21, 1975 the parties were assembled by the trial court to conduct a hearing on the plaintiff's motion for summary judgment. The transcript of the proceedings had on that date is attached hereto.

The case lay dormant until August 25, 1975, when the plaintiff filed an affidavit of prejudice, seeking disqualification of the Honorable Allen E. Barrow for want of impartiality, supplemented by the plaintiff's personal verification thereof, filed August 27, 1975.

Subsequent to the filing of the affidavit of prejudice, trial court has entered orders overruling every pending motion and setting the case for pre-trial. The case is presently set for pre-trial on September 30, 1975 before the respondent judge. The plaintiff's affidavit of prejudice remains pending.

II. BASIS FOR DISQUALIFICATION.

Three Tulsa law firms who appear as counsel of record in this case have issued written opinions approving title to the subject property, notwithstanding the restricted status of the land. Thus, upon the plaintiff prevailing in the substantive action, said attorneys face potential liability substantially in excess of their errors and ommissions (sic) insurance coverage, of which the trial judge is painfully aware. The bias of the trial court set forth in the plaintiff's affidavit of prejudice is predicated upon the trial court's stated desire to protect these attorneys from personal loss. To this end, the trial court has intimately involved itself in settlement discussions to such an extent as to render it impossible for the plaintiff to receive a fair and impartial trial of this cause on the merits in the event the parties fail to reach an accord, in the following particulars:

1. Immediately prior to the denial of the plaintiff's application for a preliminary injunction, the trial court personally telephoned the plaintiff's attorneys, and stated his personal evaluation of the plaintiff's case at between two and one-half and five percent of the amount in controversy.

2. At every subsequent hearing in the case, the trial court's primary concern was that of settlement of the lawsuit.

3. The full extent of the trial court's desire to see the case settled favorably to counsel for the defendants fully came to light at the May 21, 1975 hearing. At that time, the court made the following observation:

"Well, gentlemen, I would suggest that there be a lot of giving on both sides and there be some authority on the defendants' side to have a spokesman to get together, not at one time, and get together one sum. Mr. Baker, I would suggest, and Mr. Martin, that you have a figure that - *you know the position that everyone is in over this*, and - here is the position that the court is in, as all of you recognize. . . ." (Emphasis added)

4. On the same date, the Court again expressed a strong desire to see the case settled and the various attorneys for the defendants relieved of their exposure. After a settlement offer had been made to the plaintiff by the defendants, the Court stated:

"Gentlemen, now you have represented your client; get in here and help these lawyers."

Then, after counsel for the plaintiff advised the Court that the settlement offer was rejected, the Court stated with reference to the plaintiff's attorneys:

"There are two lawyers down there on the right that I would like to shoot."

It is of interest to note that the two latter quotes do not appear in the transcript of the May 21, 1975 hearings, although plaintiff's counsel were unaware at the time that the statements were made "off the record."

5. The trial judge's hostility to the plaintiff's claim as a result of her rejection of a settlement offer which the trial court felt should have been accepted, is evidenced by the remarks of the Court appearing on page 30 of the transcript,

"I understand. I don't think you think she ought to pay anything. That's more or less what we are saying. And she should be paid $500,000 in addition to the $107,500 she already has, and no interest and get the land with the buildings back and seek equity at the same time with dirty hands."

6. In an attempt to coerce the plaintiff into settling the case against her wishes, the Court has threatened to issue rulings wholly unauthorized by law, such as charging the plaintiff with "weighted" interest (up to 11.5%) and imposing conditions precedent to a "reconveyance" from the defendants to the plaintiff of her own property, all contrary to long established and controlling law. Further, the Court intimated that, unless the plaintiff capitulated to settlement pressures, the litigation would be protracted for as long as six years.

7. Finally, as additional evidence of the trial court's bias in favor of the defendant's attorneys, the Court has participated in the adversary process by appointing appraisers on its own motion, and without notice or hearing, and ordering that one-half of the cost thereof be charged to the plaintiff, although any evidentiary benefit from such appraisal would accrue entirely to the defendants.

As set forth in the plaintiff's affidavit of prejudice, the affidavit was made in good faith, and not for purposes of delay. In fact, on two occasions immediately prior to the filing thereof, the trial court was notified that such action was contemplated as a matter of courtesy, and afforded an opportunity to voluntarily disqualify, but the trial court failed to even

respond. Only then did plaintiff file her affidavit of prejudice, a copy of which is attached hereto. Such action was taken with the utmost reluctance and in recognition of the substantial delays which the plaintiff will suffer pursuant to reassignment of the case. However, the plaintiff earnestly believed that the actions of the trial court left no other course of action open.

III. GOVERNING LAW.

Title 28 U.S.C. § 144 provides as follows:

> "144. BIAS OR PREJUDICE OF JUDGE.– Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. . . "

IV. PROCEEDINGS SINCE AFFIDAVIT FILED.

Notwithstanding the provision in the foregoing section that, after the filing of such an affidavit, ". . . such judge shall proceed no further therein," the respondent judge has indeed proceeded therein. In fact, two days after the affidavit was filed the respondent judge issued four orders overruling all pending motions, and then set the matter for pre-trial September 4, 1975. Two days later the Court issued another order striking the pre-trial setting and rescheduling it for September 30, 1975. Copies of the appearance docket and the orders issued by the trial judge are attached hereto.

The respondent judge apparently having elected to wholly disregard the affidavit of prejudice, the plaintiff is left with no alternative but to seek extraordinary relief before this Honorable Court, or appear for pre-trial on September 30, 1975 before a trial judge obviously angered by the filing of an affidavit for prejudice.

V. BASIS FOR RELIEF.

The jurisdiction of this Honorable Court to review a refusal to disqualify by entertaining a petition for a writ of mandamus is no longer open to question. *U.S. v. Ritter*, 273 F. 2d 30 (10th Cir. 1959); *Texaco, Inc. v. Chandler*, 354 F.2d 655 (10th Cir. 1965). The only question presented is whether or not the writ should issue in this particular case, such question being governed exclusively by the sufficiency of the plaintiff's affidavit or prejudice.

The substance of the plaintiff's affidavit is that, because of the trial court's stated desire to protect individual attorneys with whom he has long been acquainted from personal losses in excess of insurance coverage, of which the trial judge is keenly aware, that the plaintiff will be unable to obtain a fair and impartial adjudication of her claim for relief on its merits before said judge. The plaintiff's apprehensions are supported by specific factual references which clearly indicate the respondent judge's predisposition in that direction. It is respectfully submitted that the actions and statements of the trial judge amply demonstrate a substantial lack of the judical impartiality to which the plaintiff is lawfully entitled. Perhaps the recent enactment of the Code of Judicial Conduct for United States Judges (approved April, 1973) has eased the burden which the law casts upon litigants seeking disqualification of a judge. Cannon 3 C. provides:

> "C. *Disqualification*
>
> (1) A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;"

Thus, a litigant need show only reasonable grounds for believing a judge to biased.

WHEREFORE, petitioner asks:

1. That an Order be issued directing the Honorable Allen E. Barrow, Chief Judge of the United States District Court for the Northern District of Oklahoma, to show cause in this Court at the earliest convenient time why he should not disqualify himself from Case No. 74-C-119 pending in such District Court.

2. That a Writ of Mandamus issue from this Court directing the Judge to so disqualify.

3. That a Writ of Prohibition issue from this Court prohibiting such Judge from continuing to make orders and rulings in such cause.

4. That a stay of the trial proceedings be granted as this Court may deem necessary to enable it to hear and determine this Petition.

5. That the Petitioner have such additional relief and process as may be necessary and appropriate under the circumstances, including vacation of all orders issued subsequent to the filing of the affidavit of prejudice.

BAKER, BAKER & MARTIN

By /s/ Jay C. Baker
Attorneys for Petitioner

STATE OF OKLAHOMA)
) ss:
COUNTY OF TULSA)

Jay C. Baker, being first duly sworn, on oath, states: That he is the Attorney for the Petitioner herein, Nellie Atkins Armstrong; that he has read the above and foregoing Petition for Writ of Mandamus, Prohibition, or Other Extraordinary Relief; that he understands the same and the effects thereof; and states that all matters and things therein set forth are within the personal knowledge of this affiant, and that same are true and correct.

/s/ Jay C. Baker

Subscribed and sworn to before me this 5th day of September, 1975.

/s/ Amy Harris
Notary Public

My Commission Expires:
July 3, 1976

I, Jay C. Baker, attorney for the plaintiff in the above styled proceeding do hereby certify that I mailed, sufficient postage prepaid, a copy of the above Petition with all exhibits attached thereto (excluding the transcript of testimony and orders) to the following attorneys at the addresses set opposite their names:

James D. Groves, 3223 E. 31st St., Tulsa, OK 74105
L.J. Fulton, 2400 1st Tower, Tulsa, OK 74103
James R. Ryan, 2400 1st Tower, Tulsa, OK 74103
Charles A. Whitebook, 415 Wright Building, Tulsa, Ok
G.C.Spillers, 217 W. 5th, Tulsa, Ok 74103
Remington Rogers, 117 E. 5th Street, Tulsa, OK
Robert H. Tips, 324 Main Mall Bldg., Tulsa, OK 74103
Royce H. Savage, Suite 914 World Building, Tulsa, OK

Chris Rhodes III, 2900 Fourth National Bank Bldg., Tulsa, OK 74119
Will Mattoon, 132 W. Main, Norman, OK 730269
Wm. B. Jones, 4th National Bank Bldg., Tulsa, OK 74119
John Harland, Wright Building, Tulsa, OK 74103
Alfred B. Knight, 310 Beacon Building, Tulsa, OK 74103
James F. David, 1800 United Founders Tower, Okla. City, Okla. 73112

/s/ Jay C. Baker

I, Jay C. Baker, certify that on the 5th day of September, 1975, I mailed a true copy of the above Petition for Writ of Mandamus, Prohibition or Other Extraordinary Relief to Hon. Allen E. Barrow, Chief United States District Judge, Federal Building, Tulsa, Oklahoma 74100 with sufficient postage prepaid thereon to entitle the same to due passage in the United States Mail.

/s/ Jay C. Baker

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NELLIE ATKINS ARMSTRONG,)
Petitioner,)
)
vs.)
)
ALLEN E. BARROW, Chief United States)
District Judge for the Northern District)
of Oklahoma; MAPLE LEAF)
APARTMENTS, LTD., a Limited)
Partnership; BROKEN ARROW MALL,)
INC., a Corporation; OWEN D. YOUNG and)
ROBERT L. LATCH, d/b/a YOUNG &)
LATCH INVESTMENTS, a General)
Partnership; FIRSTTUL MORTGAGE)
COMPANY, a corporation; SACKMAN-)
GILLIAN CORPORATION, a corporation;)
FIRST NATIONAL BANK AND TRUST)
COMPANY OF TULSA, OKLAHOMA, a)
National Banking Association; HAMILTON)
INVESTMENT TRUST, a Massachusetts)
Business Trust; and ABERCROMBIE,)
PEDIGO & SMITH, INC.,)
Respondents.)

SUPPLEMENT TO PETITION FOR EXTRAORDINARY RELIEF
(Filed September 11, 1975)

Nellie Atkins Armstrong, the petitioner in the above styled action, now submits the following information to supplement her original petition for extraordinary relief, all of which occurred subsequent to depositing the original petition in the mail to this Honorable Court.

1. On Friday, September 5, 1975, the plaintiff deposited her original petition for extraordinary relief in the United States mails for filing with this Honorable Court.

2. On the following day, Saturday, September 6, 1975, the plaintiff received by mail an order entered by the trial court on September 5, 1975, declining to "recluse" (sic). A copy of said order is attached hereto. The entry of this order renders moot that portion of the plaintiff's original petition for extraordinary relief wherein she complains that the trial court has failed to rule upon her affidavit of prejudice, and leaves only the question of the legal sufficiency of the contents of the affidavit for this Honorable Court's consideration.

3. Certain exculpatory comments set forth in the September 5, 1975 order compelled the plaintiff to submit the following additional information:

> (a) On Friday, August 22, 1975, C. Rabon Martin, law partner of the undersigned attorney, telephoned the respondent Judge's law clerk, Ms. Marilyn Culver, and requested that she advise if the respondent Judge would be willing to disqualify himself because of the Court's longstanding friendship with certain of the defendants' attorneys who face substantial personal liability in the event of a ruling favorable to the plaintiff, thereby placing the Court in an awkward position or conflicting interest. Ms. Culver asked if the plaintiff was prepared to take affirmative action to disqualify the Judge if he was unwilling to recuse, and Mr. Martin advised that, "Mr. Baker is so inclined."
>
> (b) On Monday, August 25, 1975, Mr. Martin again telephone Ms. Culver and again inquired if the respondent Judge would be willing to disqualify, advising that the filing of an affidavit would be delayed until noon. Ms. Culver advised that she was going in to talk to the Judge and would call right back (which she never did).

(c) Thus, when the Court overruled everything on Wednesday, August 27th, the respondent Judge had been twice informed that an affidavit of prejudice was about to be filed and the affidavit itself had been on file in his clerk's office for two days.

While the plaintiff concedes that the Court's explanation that the filing of the affidavits were ". . . inadvertently not called to the Court's attention. . ." may be technically accurate, it is respectfully submitted that the respondent Judge was, or should have been, aware that the filing of an affidavit of prejudice was imminent when all pending motions were overruled and the case was set for pre-trial. The plaintiff further notes that her motion for summary judgment had been set for hearing in open Court twice before, on May 21, 1975* and June 18, 1975. However, after the affidavit was filed the Court simply entered an order overruling the same, along with every other pending motion.

3. The substance of the order of the Trial court refusing to recuse is that the factual allegations of the affidavit of prejudice are insufficient to show bias or prejudice. In the order, however, the Court fails to explain or even discuss such factual allegations.

WHEREFORE, petitioner respectfully submits the foregoing, together with the attachments hereto, for this Honorable Court's consideration in passing upon her petition for extraordinary relief.

BAKER, BAKER & MARTIN

By /s/ Jay C. Baker

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*See transcript of hearing May 21, 1975, pages 8, 20 and 26, where the plaintiff's motion for summary judgment *may* have been partially sustained.

STATE OF OKLAHOMA)
) ss:
COUNTY OF TULSA)

Jay C. Baker, being first duly sworn, on oath, states: That he is the Attorney for the Petitioner herein, Nellie Atkins Armstrong; that he has read the above and foregoing Supplement to Petition for Extraordinary Relief; that he understands the same and the effects thereof; and states that all matters and things therein set forth are within the personal knowledge of this affiant, and that same are true and correct.

/s/ Jay C. Baker

Subscribed and sworn to before me this 8th day of September, 1975.

/s/ Amy Harris
Notary Public

My Commission Expires:
July 3, 1976

I, Jay, C. Baker, attorney for the plaintiff in the above styled proceeding do hereby certify that I mailed, sufficient postage prepaid, a copy of the above Supplement to Petition for Extraordinary Relief with all exhibits attached thereto to the following at the addresses set opposite their names:

Hon. Allen E. Barrow, Chief United States District Judge, Federal Building, Tulsa, Oklahoma 74100
James D. Groves, 3223 E. 31st St., Tulsa, OK 74105
L.J. Fulton, 2400 1st Tower, Tulsa, OK 74103
James R. Ryan, 2400 1st Tower, Tulsa, OK 74103
Charles A. Whitebook, 415 Wright Building, Tulsa, OK
G.C. Spillers, 217 W. 5th, Tulsa, OK 74103
Remington Rogers, 117 E. 5th Street, Tulsa, OK
Robert H. Tips, 314 Main Mall Bldg., Tulsa, OK 74103
Royce H. Savage, Suite 914 World Building, Tulsa, OK

Chris Rhodes III, 2900 Fourth National Bank Bldg., Tulsa, OK 74119
Will Mattoon, 132 W. Main, Norman, OK 73069
Wm. B. Jones, 4th National Bank Bldg., Tulsa, OK 74119
John Harland, Wright Building, Tulsa, OK 74103
Alfred B. Knight, 310 Beacon Bldg., Tulsa, OK 74103
James F. Davis, 1800 United Founders Tower, Okla. City, Okla. 73112

/s/ Jay C. Baker

EXHIBIT D

STATE OF OKLAHOMA)
) ss.
COUNTY OF MUSKOGEE)

AFFIDAVIT

Harold M. Shultz, Jr., of lawful age, being first duly sworn deposes and says as follows:

That I have been employed in the Office of the Solicitor, United States Department of the Interior, at its Muskogee office since June, 1956 until this date. Since July, 1967 I have been Field Solicitor (attorney in charge) and prior to that served as Trial Attorney, Assistant Field Solicitor and on several occasions (totalling about eight months) as Acting Field Solicitor. That the policy of this office during this period of time and for years prior thereto as reflected by various records indicates that at all times an exchange of deeds between heirs of a deceased allottee of the Five Civilized Tribes and the resulting ownership in the individual heirs of specific tracts is an acquisition by inheritance rather than purchase and that such exchange of deeds continues the restricted nature of said tracts in the individual owners as existed while all owned undivided interest.

That the attorneys of the office furnish legal assistance to heirs of a deceased allottee and prepare all the necessary petitions, pleadings and deeds and file and handle such exchanges as between heirs rather than filing partition suits since said exchanges of deeds do not destroy the restricted character of the land, has the same result as if a partition suit had been filed, are less time-consuming and require less court costs.

That we also encourage private attorneys representing heirs to file proceedings for exchanges of deeds rather than partition suits.

/s/ Harold M. Shultz, Jr.,
Field Solicitor
United States Department of the
Interior Muskogee, Oklahoma

Subscribed and sworn to before me this 15th day of May, 1975.

/s/ Dorothy E. Davenport
Notary Public

My commission expires:
November 25, 1977

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UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
P.O. Box 1508
Muskogee, Oklahoma 74401

February 25, 1974

Mr. J.C. Baker
Attorney at Law
Suite 912 May Building
Tulsa, Oklahoma 74103

Re: Allotment of Billy Adkins, full blood Creek Indian, Roll No. 826.

Dear Mr. Baker:

Your letter of February 18, 1974, addressed to the Superintendent for the Five Civilized Tribes, and your letter of February 20, 1974, addressed to Mr. Charles Miller, U.S. Probate Attorney, have been referred to this office for answer.

You are advised that the above named allottee died April 24, 1929. At the time of his death he owned in a restricted status the SE MW and SW NW, Section 14-18N-14E. This 80 acres was alloted to him as his surplus allotment. This decedent also died seized in a restricted status the NW NW, Section 14-18N-14E, which was his homestead allotment. It is obvious from 3 P.2d 682 and 33 P.2d 799, that the three children of this allotment were ½ blood Creek Indians. The Act of Congress of May 27, 1908, was in full force and effect at the time of the death of this allottee and consequently the above described 120 acres descended to these three ½ blood children in an unrestricted, taxable status, simply because the 1908 Act imposed restrictions only as to full blood heirs.

We have no record in this office that would indicate that the three heirs filed a partition suit in 1944, but rather we believe the heirs merely traded deeds with each other. At the time the various deeds between these three heirs did not need to be approved by the District Court of Tulsa County inasmuch as the land was at that time completely unrestricted in the hands of these three heirs.

There is no question but that each of the three heirs of this allottee inherited an undivided 40-acre interest in the allotment of Billy Atkins, You are familiar with the provisions of the Act of Congress of August 4, 1947, which imposed a restraint against alienation against these lands by the very wording of the Act since the heirs were ½ blood and the person from whom they inherited owned same in a restricted status.

Unfortunately, we do not know of a case which would indicate your client Nellie Atkins then Armstrong thereupon owned the SE NW completely restricted or whether she only owned an undivided 1/3 interest which was restricted. Our theory is that since she inherited an undivided 40 acres, that the 40 acres she acquired by an exchange of deeds with her fellow heirs should be fully restricted under the 1947 Act.

The Bureau of Indian Affairs has no authority to approve or disapprove any conveyance of land inherited by an individual of ½ or more blood from an allottee of the Five Civilized Tribes. Consequently, we do not feel that approval of your proposed contract with Mrs. Armstrong by the Area Director of the Muskogee Area Bureau of Indian Affairs would in any way give you a valid enforceable lien for specific performance on any land which you might recover for your client. Contracts such as you sent to Mr. Miller are as a matter of policy never approved by the Bureau of Indian Affairs. We notice you have provided for approval of the contract by the District Court of Tulsa County. However, any such approval by this court must

be, in our opinion, made in accordance with the provisions of the 1947 Act after petition, notice and publication.

Sincerely yours,

/s/ Harold M. Shultz, Jr.
Field Solicitor

Enclosure
Agreement (2)

ACT OF JULY 22, 1790
(1 Stat. 137)

Chap. XXXIII. – *An Act to regulate and intercourse with the Indians tribes.*

SEC. 4. *And be it enacted and declared*, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

SUPPLEMENTAL CREEK TREATY OF AUGUST 8, 1902

Approved by Act of Congress June 30, 1902, and Ratified by the Creek Nation July 26, 1902; Effective by Proclamation of the President of the United States August 8, 1902.

(32 Stat. 500)

An Act to Ratify and Confirm a Supplemental Agreement With the Creek Tribe of Indians, and for Other Purposes.

16. Lands alotted to citizens shall not in any manner whatever, or at any time be encumbered, take, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter

of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

17. Section 37 of the agreement ratified by said act of March 1, 1901, is amended, and as so amended is re-enacted to read as follows:

> "Creek citizens may rent their allotments, for strictly non-mineral purposes, for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes and for a period longer than one year agricultural purposes, and leases for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Creek Nation and grazed on lands not selected for allotment by citizens, the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section 2117 of the Revised Statutes of the United States shall not hereafter apply to Creek lands."

ACT OF MAY 27, 1908
(35 Stat. 312)

§ 9. That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land. Provided, That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee: Provided further, That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March fourth, nineteen hundred and six, the homestead of such deceased allottee shall remain inalienable, unless restrictions against alienation are removed therefrom by the Secretary of the Interior in the manner provided in section one hereof, for the use and support of such issue, during their life or lives, until April twenty-sixth, nineteen hundred and thirty-one; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from all restrictions; if this be not done, or in the event the issue hereinbefore provided for die before April twenty-sixth, nineteen hundred and thirty-one, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: Provided further, That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

ACT OF JUNE 14, 1918
(40 Stat. 606)

An Act to provide for a determination of heirship in cases of deceased members of the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Tribes of Indians in Oklahoma,

conferring jurisdiction upon district courts to partition lands belonging to fullblood heirs of alottees of the Five Civilized Tribes, and for other purposes.

§ 2. That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character.

ACT OF APRIL 12, 1926
(44 Stat. 239)

An Act to amend section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), and for putting in force, in reference to suits involving Indian titles, the statutes of limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties and for other purposes.

Sec. 2. The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or hereafter accruing to any such Indians

or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her heirs or grantees, either in his own behalf or by the Government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any other citizen of said State: Provided, That no cause of action which heretofore shall have accrued to any such Indian shall be barred prior to the expiration of a period of two years from and after the approval of this Act, even though the full statutory period of limitation shall already have run or shall expire during said two years' period, and any such restricted Indian, if competent to sue, or his guardian, or the United States in his behalf, may sue upon any such cause of action during such two years' period free from any bar of the statutes of limitations.

ACT OF JANUARY 27, 1933
(47 Stat. 777)

An Act Relative to restrictions applicable to Indians of the Five Civilized Tribes in Oklahoma.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior, belonging to and only so long as belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half or more Indian blood, enrolled or unenrolled, are hereby declared to be restricted and shall remain subject to the jurisdiction of said Secretary until April 26, 1956, subject to expenditure in the

meantime for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe: Provided, That where the entire interest in any tract of restricted and tax-exempt land belonging to members of the Five Civilized Tribes is acquired by inheritance, devise, gift, or purchase, with restricted funds, by or for restricted Indians, such lands shall remain restricted and tax-exempt during the life of and as long as held by such restricted Indians, but not longer than April 26, 1956, unless the restrictions are removed in the meantime in the manner provided by law: Provided further, That such restricted and tax-exempt land held by anyone, acquired as herein provided, shall not exceed one hundred and sixty acres: And provided further, That all minerals including oil and gas, produced from said land so acquired shall be subject to all State and Federal taxes as provided in section 3 of the Act approved May 10, 1928 (45 Stat. L. 495).

ACT OF JUNE 26, 1936
(49 Stat. 1967)

§ 2. Whenever any restricted Indian land or interests in land, other than sales or leases of oil, gas or other minerals therein, are offered for sale, pursuant to the terms of this or any other Act of Congress, the Secretary of the Interior shall have a preference right, in his discretion, to purchase the same for or in behalf of any other Indian or Indians of the same or any other tribe, at a fair valuation to be fixed by the appraisement satisfactory to the Indian owner or owners, or if offered for sale at auction said Secretary shall have a preference right, in his discretion, to purchase the same for or in behalf of any other Indian or Indians by meeting the highest bid otherwise offered therefor.

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ACT OF AUGUST 4, 1947
(61 Stat. 731)

An Act Relative to restrictions applicable to Indians of the Five Civilized Tribes of Oklahoma, and for other purposes.

§ 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all restrictions upon all lands in Oklahoma belonging to members of the Five Civilized Tribes, whether acquired by allotment, inheritance, devise, gift, exchange, partition, or by purchase with restricted funds, of whatever degree of Indian blood, and whether enrolled or unenrolled, shall be, and are hereby, removed at and upon his or her death: Provided, (a) That except as provided in subdivision (f) of this section, no conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated; (b) that petition for approval of conveyance shall be set for hearing not less than ten days from date of filing, and notice of hearing thereon, signed by the county judge, reciting the consideration offered and a description of the land shall be given by publication in at least one issue of a newspaper of general circulation in the county where the land is located and written notice of such hearing shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition is to be heard. The grantor shall be present at said hearing and examined in open court before such conveyance shall be approved, unless the grantor and the probate attorney shall consent in writing that such hearing may be had and such conveyance approved in the absence of the grantor, and the court must be satisfied

that the consideration has been paid in full. Proceedings for approval of conveyances by restricted heirs or devisees under this section shall not be removable to the Federal court; (c) the evidence taken at the hearing shall be transcribed and filed of record in the case, the expense of which, including attorney fees and court costs, must be borne by the grantee. The court in its discretion, when deemed for the best interest of the Indian, may approve the conveyance conditionally, or may withhold approval; (d) that at said hearing competitive bidding may be had and a conveyance may be confirmed in the name of the person offering the highest bid therefor or when deemed necessary the court may set the petition for further hearing; (e) that the probate attorney shall have the right to appeal from any order approving conveyances to the district court of the county in which the proceedings are conducted within the time and in the manner provided by the laws of the State of Oklahoma in cases of appeal in probate matters genereally, except that no appeal bond shall be required; (f) that sales of the interest of minor and incompetent persons shall be made in conformity with the laws of the State of Oklahoma. Notice of such sale shall be given to the probate attorney of the district in which the petition is filed at least ten days prior to the date on which the petition for sale is to be heard; (g) that nothing contained in this section shall be construed to modify or repeal the Act of February 11, 1936 (49 Stat. 1135), relating to leases for farming and grazing purposes.

§6. (b) All tax-exempt lands owned by an Indian of the Five Civilized Tribes on the date of this Act shall continue to be tax-exempt in the hands of such Indian during the restricted period; Provided, That any right to tax exemption which accrued prior to the date of this Act under the provisions of the Acts of May 10, 1928 (45 Stat. 495), and January 27, 1933 (47 Stat. 777), shall terminate unless a certificate of tax exemption has been filed of record in the county where the land is located within two years from the date of this Act.

(c) Any interest in restricted and tax exempt lands acquired by descent, devise, gist, exchange, partition, or purchase with restricted funds, after the date of this Act by an Indian of the Five Civilized Tribes of one-half or more Indian blood shall continue to be tax-exempt during the restricted period; Provided, That the tax-exempt lands of any such heir, devisee, donee, or grantee, whether acquired by allotment, descent, devise, gift, exchange, partition, or purchase with restricted funds, shall not exceed one hundred and sixty acres in the aggregate: Provided further, That nothing contained in this subsection shall be construed to terminate or abridge any right to tax exemption to which any Indian was entitled on the effective date of this Act.

(d) Nothing contained in this section shall be construed to affect any tax exemption provided by the Act of June 26, 1936 (49 Stat. 1967).

§ 10. Section 2 of the Act of June 26, 1936 (49 Stat. 1967), commonly known as the Oklahoma Welfare Act, shall be amended by the addition of a new paragraph as follows:

"The preference right of the Secretary to purchase shall be considered as waived where notice of the pendency of sale is given in writing to the Superintendent of the Five Civilized Tribes for at least ten days prior to the date of sale and the Secretary does not within that time exercise the preferential right to purchase."